

UNITED STATES AND UNITED KINGDOM SUPPLEMENTARY EXTRADITION TREATY

HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE NINETY-NINTH CONGRESS

FIRST SESSION

ON

TREATY DOC. 99-8, SUPPLEMENTARY EXTRADITION TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN IRELAND, WITH ANNEX

AUGUST 1 SEPTEMBER 18,
AND OCTOBER 22, 1985

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(II)

CONTENTS

Hearing days:

Page

AUGUST 1, SEPTEMBER 18, AND OCTOBER 22, 1985

Statements of:

Sofaer, Abraham D., legal adviser, U.S. Department of State	2
Jensen, D. Lowell, Deputy Attorney General, U.S. Department of Justice..	6
Biaggi, Mario, a Representative in Congress from New York.....	48
DeConcini, Dennis, a U.S. Senator from Arizona	63
Hughes, William J., a Representative in Congress from New Jersey.....	71
McCarthy, Eugene J., former U.S. Senator.....	89
Pyle, Prof. Christopher H., Mount Holyoke College, Department of Poli- tics	95, 163, 216
Bassiouni, Prof. M. Cherif, professor of law, DePaul University.....	135
Rice, Prof. Charles E., professor of law, Notre Dame Law School.....	137
Fish, Hamilton, Jr., a U.S. Representative in Congress from New York.....	141
Flynn, Raymond L., mayor, city of Boston.....	149
Hanney, William M., Esq., Schiff, Hardin & Waite.....	170
Lubet, Prof. Steven, Northwestern University School of Law	173
Gilman, Benjamin A., a Representative in Congress from New York.....	222
Halperin, Morton H., director, Washington office, American Civil Liber- ties Union.....	224
Helton, Arthur C., Esq., Lawyers Committee for International Human Rights.....	226
Carliner, David, Esq., chairman, the International Human Rights Law Group.....	229
Durkan, Frank, Esq., O'Dwyer & Bernstein, Brehan Law Society of New York	233
Maier, Judge Eugene, E.J., court of common pleas, first judicial district, Philadelphia, PA; and president of Brehan Law Society of Philadelphia, PA.....	238
O'Dempsey, Prof. Keara M., St. Thomas School of Law	242
Insertions for the record:	
Extradition, Political Crimes, and Ways To Deal With Terrorism	164

APPENDIX

Prepared statements of:

Representative Biaggi.....	51
Senator DeConcini.....	65
Abraham D. Sofaer	244
Dante C. Simbulan.....	270
M. Cherif Bassiouni	276
Charles E. Rice.....	306
Joseph Roche.....	343
Raymond L. Flynn	351
Representative Rodino	356, 406
Irish-American Unity Conference, State of Connecticut	361
Father James Joyce	364
American Committee on Africa.....	367
Kieran Egan	374

IV

Page

Prepared statements of—Continued

William M. Hannay	380
Christopher H. Pyle	98, 388
Steven Lubet	390
Morton H. Halperin	411
Arthur C. Helton	422
David Carliner	449
Frank Durkan	460
Eugene E.J. Maier	483
Keara O'Dempsey	491
Representative Hughes	504
Francis A. Boyle, professor of law, University of Illinois College of Law	511
Richard P. Lawlor, State president, Irish American Unity Conference, State of Connecticut (with attachments)	537
Insertions for the record:	
Responses from Judge Sofaer to questions from Senator Dodd	549
BBC cancels documentary (Washington Post, July 31, 1985)	568
Responses from Judge Sofaer to questions from Senator Biden	569
Text of European Convention on the Suppression of Terrorism	570
Letter from Representative Hughes to Senator Lugar	576
Letter from Representative Manton to Senator Lugar	577
Letter from Representative Manton to Secretary of State Shultz	579
Letter from Representative Biaggi to Senator Lugar	580
Letter from Representative DioGuardi to Senator Lugar	585
Letter to Foreign Relations Committee from the National Lawyers Guild ..	587
Letter to Senator Kerry, House of Representatives, State House, Boston	592
In re: Joseph Patrick Thomas Doherty	597
Letter to Representative DioGuardi from Mr. O'Rourke	614
Article in Congressional Record, "On American Interests in Ireland"	616
Letter to Senator Lugar from Kader Asmal	617
A study by Michael Farrell as to the effects of the new treaty in regard to political fugitives who may be affected by it	620
Letter to Professor Rice from Mary Holt Morre	630
Letter to members of the Foreign Relations Committee from Samuel P. O'Reilly	631
Articles written by Mayor Flynn and submitted by Senator Kerry	634
U.S. Extradition Treaty and Lincoln's actions during the Civil War	648
Information on the Easter Rising in Ireland and statistical information relative to violence in Northern Ireland	654
IRA terrorist acts, 1969-72	655
Irish information partnership deaths in Northern Ireland by responsible agent: 1977-85	650
Irish information partnership Northern Ireland casualties by category of victim and agent	651
Can the violence be stopped? (New York Times, November 24, 1985)	652
New Ireland reform, November 3, 1983	653
Northern Ireland and U.S. Justice (Boston Globe, September 23, 1985)	660
Discussion paper by the SDLP, "Justice in Northern Ireland"	661
Letter from Professor Pyle to Senator Evans	678
Responses from Mr. Hannay to questions from Senator Kerry	681
Responses from Professor Lubet to questions from Senator Kerry	684
A comparative analysis of the United Kingdom's emergency provisions of terrorism act and martial law provisions in the Philippines, South Africa, and South Korea	692
Responses from State to questions from Senator Tribble	699
Responses from State to questions from Senator Biden	700
Responses from State to questions from Senator Kerry	701
Responses from State to questions from Senator Pell	701
Responses from State to questions from committee staff	703
Summary of overseas terrorist activity, June 1982	730
Summary of overseas terrorist activity, July 1983	758
Chart of signatures and ratifications to European Convention on the Suppression of Terrorism	764
Appendices to the statements of Prof. Keara O'Dempsey	778
Irish National Caucus, Inc.	864
Letter from President Reagan to Chairman Lugar	870
Letter from Secretary Shultz to Chairman Lugar	872
Letter from American Bar Association to Chairman Lugar	873

	Page
Insertions for the record—Continued	
Newspaper editorials on treaty	874
Public Security and Individual Freedom: The Dilemma of Northern Ireland, by Thomas P. Foley, from the Yale Journal of World Public Order, Vol. 8, No. 2, spring 1982	912
Overview of Judicial Authority in United States Law To Determine Whether an Alleged Offense Falls Within the Political Offense Exception for Purposes of International Extradition, From the Congressional Research Service, Library of Congress	933

UNITED STATES AND UNITED KINGDOM SUPPLEMENTARY EXTRADITION TREATY

THURSDAY, AUGUST 1, 1985

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met at 10 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Paul S. Trible, Jr., presiding.

Present: Senators Lugar, Boschwitz, Pressler, Trible, Evans, Pell, Biden, Zorinsky, Cranston, Dodd, and Kerry.

Senator TRIBLE. The committee will come to order.

I am pleased to convene today's hearing to receive testimony on the recently signed Supplementary Extradition Treaty between the United States and the United Kingdom.

The proposed treaty would restrict the availability of the political offense exception in extradition requests between our Nation and Great Britain.

As presently applied, this exception permits individuals accused of violent crimes, such as murder and kidnapping, to avoid extradition to their home country to stand trial.

In a recent editorial, the New York Times called the political offense exception a legal foxhole that shelters suspected terrorists from justice. The Times and other commentators have called on the Senate to ratify this treaty swiftly.

However, the treaty poses a number of complex and difficult legal and policy questions. These need to be examined thoroughly by the committee.

For this reason, there will be 2 days of hearings on the treaty.

Today the committee will hear from the administration. The Departments of State and Justice will explain the details of the treaty and the reasons why the Senate should consent to ratification.

In September, the committee will hear from interested members of the public in order to ensure a thorough review of the matter.

The treaty requires us to weigh the need to act to combat terrorism against the traditional role of our Nation as a source of asylum for political dissidents. This is not an easy task, and it illustrates how difficult it is to take steps against terrorism.

The frequency of violent acts of terror around the world has reached alarming proportions. Terrorists often are able to elude capture by crossing international borders. Should terrorists be apprehended, a means of bringing them to justice is essential.

We are unlikely to receive cooperation in our efforts to combat terrorism if we refuse to be included in a regime that now encompasses most European nations.

Reducing the ambit of the political offense exception, however, forces us to reassess a cherished American principle and a majority of my colleagues must be persuaded that necessity requires a diminished role for the United States as a source of sanctuary.

This morning it is my pleasure to welcome Administration witnesses who will testify as a panel: Judge Abraham Sofaer, who is now Legal Adviser to the Department of State, and Lowell Jensen, Deputy Attorney General, Department of Justice.

In the absence of my colleagues, the time of 10:00 a.m. having arrived, gentlemen, we will begin.

I await your testimony.

I would say, Judge, that I have read your very fine and detailed statement. It will be made a part of the record, and you are invited to give your whole statement or summarize it, as you deem appropriate.

STATEMENT OF ABRAHAM D. SOFAER, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Judge SOFAER. I will take the option of summarizing my statement.

Thank you, Mr. Chairman.

I am honored to be here before you today to testify on this Supplementary Extradition Treaty between the United States and the United Kingdom.

Terrorism, as you said, is rampant in the world today, and we are a favorite target. The United States and the other democracies are anathema to terrorist murderers and hoodlums. We believe in ballots and judges. They believe in bullets and bombs. We believe in rule by the majority and they believe in rule by terror.

We are now in the midst of a worldwide struggle against terrorism and the sponsor states of terrorism.

It is in the context of this struggle that you must consider the treaty before you. The treaty is aimed directly at terrorists. It establishes that certain violent crimes will not be tolerated in democratic nations, regardless of the motivation of those who commit them, by eliminating the so-called political offense exception for terrorists who strike in our country and take refuge in the United Kingdom and for those who strike there and take refuge in the United States. This is a treaty that all Americans should enthusiastically support.

The key provision is article 1, which excludes certain violent crimes from the political offense exception contained in the current treaty: aircraft hijacking and sabotage, crimes against internationally protected persons, including diplomats, kidnapping, hostage taking, murder, manslaughter, and other violent crimes.

Article 2 provides that extradition shall be denied if barred by the statute of limitations of the requesting state.

Article 3 extends the maximum time period in which the requesting state may submit evidence in support of the extradition request.

Article 4 provides that the supplementary treaty will apply to offenses committed before its entry into force, so long as the act in question was a crime under both United States and United Kingdom law at the time it was committed. This is the standard retroactivity clause contained in U.S. extradition treaties.

Let me now turn to the reasons why this amendment to the political offense exception is necessary.

As you know, extradition is a fundamental practice in international law. It is the principal mechanism by which fugitives are transferred from one jurisdiction to another for prosecution. Bilateral extradition agreements insure that such transfers are provided as a matter of obligation and proceed along established channels. Without such agreements, governments would have to resort to ad hoc arrangements of uncertain reliability or risky and disruptive forms of self-help. It is no surprise, therefore, that nations have entered into extradition agreements for centuries.

The political offense doctrine is an exception to the general principle of extradition. This exception arose in the 18th century, as revolutionaries struggled for freedom against despotic regimes. When revolutionaries fled to the fledgling democracies of Western Europe, those governments sheltered them from political persecution. They refused to extradite fugitives whom requesting states sought to punish for engaging in political activities. At the core of this exception were such quintessentially political crimes as sedition, treason and espionage.

The historical development of this exception teaches several important lessons. First, while the use of the exception in purely political crimes has been noncontroversial, its invocation to protect from extradition persons who engage in crimes of violence and other common crimes has always been problematic and controversial. At one time or another, by statute or decision, nations have limited the relief available to those who used violence to secure political ends.

Second, the contours of the exception have always varied from country to country and from treaty to treaty. They are not carved in stone. In 1977, the European Convention for the Suppression of Terrorism adopted restrictions on the political offense exception nearly identical to those contained in this supplementary treaty.

Finally, the exception has never been viewed as creating rights or entitlements for the fugitives themselves. Rather, it reflects each sovereign government's foreign policy judgment as to the circumstances under which it will provide sanctuary to political opponents of a given foreign regime. The time has come to draw some careful limits to the political offense exception, to bring it into line with our national policies against terrorism.

In recent years, the exception has resulted in refusals by U.S. courts to extradite persons suspected or convicted of committing heinous crimes that are not, by their nature, political acts. Mr. Chairman, I believe that you will best appreciate how such court decisions can extend the political offense exception beyond reasonable bounds if I give you an example of how that doctrine has been invoked against us in our efforts to enforce U.S. law.

In 1973, five Americans hijacked a domestic U.S. flight and took it to Algeria. They held the passengers hostage, and extorted \$1

million in ransom from the airline. Two of the hijackers had escaped from prison, where they were serving sentences for murder and armed robbery. The U.S. Government asked France to extradite the hijackers to stand trial in the United States. The fugitives claimed, however, that they had hijacked the plane in order to escape racial segregation in the United States. This political motive, the French court held, transformed the air piracy and extortion engaged in by these defendants into political offenses, exempt from extradition. Other equally unacceptable decisions have been rendered, based on political rhetoric, despite the existence in this country of a free political system and a fair judicial process. Decisions such as these and the outright refusal of many anti-U.S. regimes to extradite terrorists have led Senators and other national leaders to seek in utter frustration effective remedies to bring killers to justice.

I testified Tuesday at a hearing in which Senator Specter called for consideration of measures of self-help. I told Senator Specter on Tuesday and I tell you now that we are justifiably outraged when nations refuse to extradite or prosecute criminals and terrorists who act against the United States or Americans. But we cannot credibly assert our outrage on this account and, at the same time, refuse to extradite terrorists to our own allies.

It is common knowledge in the international community that United States courts have refused to extradite to the United Kingdom four members of the Provisional Irish Republican Army [PIRA] who are accused, or convicted, of violent terrorist crimes. In each case, extradition was denied because the terrorist crimes were committed as part of a political struggle.

These decisions direct a blow to the rule of law even more devastating than if Lebanon were to refuse on similar grounds to extradite the killers of Robert Stethem. At least Lebanon can prosecute those terrorists for acts on its own soil. We, on the other hand, have no jurisdiction to prosecute PIRA terrorists for acts in the United Kingdom. The terrorists involved, therefore, have escaped being tried for their crimes.

The issue before you is, of course, not limited to these individual cases. It is not limited to the Provisional IRA or to our relations with the United Kingdom. Rather, this treaty presents an issue of moral principle and of political necessity. Do we, the American people, want our country to serve as a sanctuary for terrorists who attack democratic governments?

This Administration most emphatically does not. And neither does any responsible member of either major party. Indeed, even those who strongly support the non-Marxist objectives of PIRA reject their methods and deem them, as well as all Protestant, Muslim, Sikh, and Jewish terrorists, vicious criminals.

This supplementary treaty strikes the right balance. It narrows the political offense exception as applied to United Kingdom requests to pure political and nonviolent crimes. It reflects the basic principle that terrorist violence should not be tolerated against stable democracies in which the political process is available to redress legitimate grievances and in which the judicial system provides fair treatment.

Moreover, by using a bilateral treaty to implement this principle, we would not alter our extradition laws across the board. Instead, we are able to decide whether to limit the exception on a nation-by-nation basis.

We have chosen the United Kingdom, Mr. Chairman, as our first partner in this enterprise in part because of the recent United States court decisions I have described. But the United Kingdom is also an ideal nation with whom to begin this process from the moral and political point of view. It is our longest and closest ally. As Mr. Jensen points out in his testimony, it was our first treaty partner to agree to an extradition regime. The United Kingdom has one of the most open political systems in the world. It tolerates all nonviolent forms of dissent and allows even bitter opponents to participate in the political system.

In addition, the British system of justice provides fundamentally fair treatment to all, including both Republican and Loyalist terrorists. The United Kingdom has created special nonjury courts, known as "Diplock" courts, to try specified crimes generally engaged in by terrorists. The reason juries are not used in these courts stems from the fact that the terrorists involved do not just murder policemen and soldiers. They also kill ordinary citizens. The British have concluded that the threat of terrorist reprisals against jurors in these cases justifies nonjury trials. The same judgment, by the way, has been made by the Republic of Ireland, which also tries terrorists in bench trials.

The Diplock courts afford defendants the essential components of procedural fairness: Open trials, witnesses may be called and cross examined, the prosecution has the burden of proving guilt beyond a reasonable doubt, the defendant has the right to legal counsel and an absolute right to appeal. One of the judges who refused to extradite a PIRA terrorist recognized the fundamental fairness of the judicial system used in Northern Ireland terrorist cases. I have quoted his statement in this respect in my written testimony, and it is instructive.

Some opponents have condemned this supplementary treaty as an assault upon civil liberties. They claim it will destroy the political offense exception, will facilitate repression of dissent, and will abolish judicial review of extradition decisions.

These criticisms are unfounded. The treaty does not eliminate the political offense exception, but only removes from its scope certain specified violent crimes. In particular, the political offense exception will still apply to fugitives who can demonstrate they are being sought because of political views or truly political crimes or for nonviolent crimes. Moreover, the exception will continue in full force with respect to all nations, other than the United Kingdom, and will never be revised with respect to repressive regimes.

Furthermore, U.S. courts will continue to review extradition decisions, determining, for example, whether the Government has presented sufficient evidence of guilt to justify extradition and whether the crime for which extradition is sought meets the treaty's criteria. Finally, even fugitives from the United Kingdom will still be able to attempt to gain asylum and other executive relief from the Secretary of State.

In short, the alleged threat to civil liberties or political freedom posed by this treaty is imaginary.

I also want to dispell the notion that this treaty is somehow related to the question of the reunification of Ireland or of independence for Northern Ireland. The treaty applies equally to the terrorist acts of Republicans and Loyalists and to such acts by any other person in the United Kingdom, regardless of motive.

Many Americans, many legislators support the Republican cause. But all responsible political leaders in the United States, including our leading Irish Senators and Congressmen, have condemned violence in Ireland.

I want to read to you, Mr. Chairman, a statement signed by Senators Dodd, Moynihan, Kennedy, Pell, Kerry, and other members of this committee. It is signed by "Friends of Ireland," Mr. Chairman. This is their statement:

We again express, in the strongest terms, our determination to uphold the rule of law and to encourage deeper devotion to democratic principles and institutions which are, in the end, the surest guarantors of individual liberty and minority rights. We oppose without qualification any resort to the bomb or the bullet as a way to promote political change.

Political violence is morally abominable, as well as inherently antidemocratic. There is no more place for it in Northern Ireland than there is in the United States. The issue simply has nothing to do with the Irish Republican cause.

Mr. Chairman, the United States has more to gain from adoption of this supplemental treaty than any other nation in the world, and more to lose from its rejection. Our country is among the principal victims of terrorist assaults. We must remain credible in the fight against terrorism, and we simply cannot demand the surrender of terrorists abroad if we refuse to extradite terrorists to other nations as well.

The Senate's action on this treaty will be viewed by the world as a test of U.S. resolve in fighting terrorism. We have issued proclamations condemning hijacking and assassination. We have demanded responsible cooperation from other nations, particularly our allies. We must respond in kind. We must make clear our unwillingness to continue to serve as a sanctuary for terrorists who choose to attack our democratic allies rather than use available political remedies.

This is the fundamental message that the Senate's action must now convey.

I respectfully request that the committee report on this treaty as a priority matter, and that it recommend that the Senate give its advice and consent to ratification without reservation. I appreciate this opportunity to testify, and will be pleased to answer any questions.

Senator TRIBLE. Thank you for your very fine statement.
Mr. Jensen.

**STATEMENT OF D. LOWELL JENSEN, DEPUTY ATTORNEY
GENERAL, UNITED STATES DEPARTMENT OF JUSTICE**

Mr. JENSEN. Mr. Chairman and members of this very fine committee, I, too, appreciate this opportunity to be here before the committee and join in the testimony of Judge Sofaer from the De-

partment of State and express on behalf of the Department of Justice our support for the proposed supplementary treaty.

With the entry into force of the Jay Treaty in 1794, the United Kingdom became our first extradition treaty partner. Since then, it has remained one of our best partners in extradition.

Extradition treaties are invaluable law enforcement tools that must be periodically updated to reflect the advent of new crimes or new trends in both law enforcement techniques and in the commission of old, familiar crimes.

The various treaties and supplements thereto governing extradition relations between the United States and the United Kingdom have been revised and updated on numerous occasions to meet the evolving needs of our respective countries during the past 191 years.

The 1985 Supplementary Extradition Treaty, which amends several provisions of the 1972 United States-United Kingdom Extradition Treaty, is designed primarily to address an issue of concern to all civilized nations: Terrorism.

The issue of terrorism is of particular concern to the United States and the United Kingdom since the citizens of our two countries are primary targets of international terrorism.

The 1972 United States-United Kingdom Extradition Treaty bars the extradition of persons whose crimes are deemed to be so-called political offenses. While this term has defied comprehensive definition, American courts have uniformly construed "political offenses" to mean those that are incidental to severe disturbances such as war, revolution, and rebellion.

In recent years, there have been four cases involving requests by the United Kingdom for the extradition of Irish Republican Army members charged or convicted of terroristic crimes. The fugitive in the first such request had caused an explosion in a British army barracks in Yorkshire, England, that injured a civilian.

The IRA member in the second request had attempted to murder a British soldier who was a member of a plainclothes intelligence patrol in Belfast.

The third request was for a convicted IRA member who is charged with murdering a 21-year-old plainclothes, off-duty police constable in London; sending letter bombs that caused severe injuries to their recipients; placing an explosive device in the London area; and with conspiracy to cause explosions that were likely to result in the indiscriminate killing of civilians in the London area.

The fourth request was for an IRA member who, with several associates, planned an ambush of a British army convoy. In furtherance of that scheme, they commandeered the home of a Northern Irish family, whose house overlooked the route to be followed by the convoy. Alerted to the proposed ambush, British security forces stormed the house. During the ensuing melee, this IRA member shot and killed a British officer.

Caught, convicted, and sentenced to life imprisonment, he became 1 of 12 jailed IRA members who somehow obtained weapons and escaped from H.M. Prison, Crumlin Road, Belfast. They left behind several severely wounded guards.

In each of the four cases described, the fugitive claimed that the unsettled political situation in Northern Ireland constituted a

"war, revolution, or rebellion" and that his offenses qualified for treatment as "political offenses." The U.S. courts have accepted this argument in all but one case, which is currently on appeal before the Ninth Circuit Court of Appeals.

Actually, in that case, the U.S. magistrate had first granted extradition, then the district court had reversed that and denied extradition on the basis of political offense, and that is now before the court of appeals.

The British Government has concurred in our view that it is unacceptable that a criminal may commit a heinous offense which shocks the sensibilities of all decent people, flee the country which he has terrorized, and find safe haven in another country by labeling his crime a political offense.

The United States cannot condemn terrorism committed abroad against our citizens and then provide shelter on these shores for perpetrators of such atrocities against citizens of other countries.

Article I of the 1985 treaty lists a variety of crimes associated with terrorism that are so destructive of society that, under no circumstances, should they be considered as political offenses for which extradition may be denied. Thus, terrorists committing such crimes as aircraft hijacking and sabotage, crimes against diplomats, hostage taking, and other heinous crimes, such as murder, manslaughter, malicious assault, and certain offenses involving firearms, explosives, and damage to property, would no longer be able to hide behind the political offense exception to avoid extradition from either this country or the United Kingdom.

Once the supplementary extradition treaty enters into force, terrorists wanted by the United States or the United Kingdom or found within the territory of either can expect swift and certain justice for their crimes.

I shall now highlight other provisions of the supplementary extradition treaty.

Article II provides that the statute of limitations of the requesting party only shall be applied in determining whether extradition is time barred. In the past, a fugitive has been able to claim that even though he committed a crime in the requesting country, his extradition should be barred because the requested country's statute of limitations would prevent his prosecution for the offense.

This provision is standard in our new treaties.

Article III expands from 45 to 60 days the time by which a formal extradition request and supporting documents must be submitted by the requesting party to the requested party, following the provisional arrest of a fugitive by the requested party. This will provide more time for the preparation and transmittal of documents for the increasingly complex crimes for which extradition is being sought by the United States and the United Kingdom. This increase in time is more in line with the provisions of our other extradition treaties negotiated in the last 10 years.

Article IV provides that the supplementary treaty shall apply to any offense committed before or after it enters into force, except an offense which was not a crime under the laws of both parties at the time of its commission. Such provisions have also become standard in our more recent treaties.

Mr. Chairman and members of the committee, the Department of Justice joins the Department of State in urging the swift advice and consent of the Senate to ratification of this supplementary extradition treaty between the United States and the United Kingdom.

I thank you for this opportunity and would be pleased also to respond to your questions.

Senator TRIBLE. Mr. Jensen, thank you for your statement.

Before we turn to a more detailed discussion of the provisions of the supplementary treaty, I believe the hearing record would benefit from your explanation of how the extradition process works.

An offense is committed in another country, the person alleged to have committed that offense comes to the United States and is apprehended or is identified and obviously another country then makes a request for his or her extradition.

Would you then take us step by step on how this legal process unfolds? Either witness may respond.

Mr. JENSEN. Senator, I think you have given it its basic definition.

Senator TRIBLE. But I am more interested in the legal proceedings that ensue.

Mr. JENSEN. Let us say that a fugitive from justice comes to the United States, and information is given to the United States by the requesting country—which may be the United Kingdom or any other country. As a result of that information, and it has to be appropriate information that is sufficient to do so, a so-called provisional arrest is made in the United States for that offense.

Essentially, then we look to these kinds of considerations: First, whether an extradition treaty is in force and in effect. We do not have extradition treaties with every country. It is only in those instances where there is a bilateral treaty and an agreement. Second, we have to look at that extradition treaty, and we have to see whether or not the offense for which extradition is sought is included in the treaty. Not all offenses of all countries, even in those situations where we have treaties, are included. So, we would look at that point to see whether or not the treaty includes the offense.

Then there is a proceeding—and this would be a judicial proceeding—to decide whether or not there is probable cause to believe that the offense has been committed. This is based upon the documentation that I mentioned in my testimony. That is the time period in which the requesting country then forwards the necessary legal documentation to support their request. Upon the information that they supply, we decide whether or not probable cause to believe that offense has been committed exists. Then we have to decide whether or not, in fact, the person who is being sought is indeed the person responsible for the offense; that is, we have to establish extradition information that the person committed that offense. So, we identify, in effect, that person as being one for whom there is probable cause, there is documentation, that it is within the treaty and that we do have an existing treaty in effect.

So, we go through a process of law enforcement to make an arrest and a judicial process to establish the four points that I mentioned.

Senator TRIBLE. Before whom does this judicial process take place?

Judge SOFAER. Usually before a magistrate, a U.S. magistrate.

Mr. JENSEN. As I mentioned, in the one case that I discussed, the original decision was made by the magistrate, and then it was taken to the district court. But, generally, they are before U.S. magistrates.

Judge SOFAER. There is a right to obtain review by a district judge by filing a habeas petition.

Senator TRIBLE. Is that then a hearing de novo or is that simply an examination? There is no record kept before the magistrate.

Mr. JENSEN. Essentially de novo.

Senator TRIBLE. So, then, in an appeal setting, the U.S. district court judge would make his own findings and fact and conclusions of law?

Judge SOFAER. He could, or he could accept the magistrate's.

Senator TRIBLE. The United Kingdom has entered into similar extradition agreements with other countries. You have mentioned a European accord.

What other countries have recognized this kind of regime, where there is a limitation of the political offense exception?

Judge SOFAER. Well, there are at least seven countries in Europe that have adopted that accord without any reservation affecting the political offense exception. We have collected that, and I can give you, later on, a detailed statement of which nations have done that and which have not.

I can tell you that I know of at least two nations in Europe that have not adopted the principle.

The important thing to remember is that the principle is there. The European Community has adopted, essentially, the regime that we are proposing here as the principle that should govern in Europe. The United Kingdom has accepted that.

Now, I want to caution you that, other than France which, as a matter of principle, has supported these revolutionary types of activities by giving this sort of relief to terrorists and rebels—that is a French tradition stemming from the revolution, I gather, and—

Senator BIDEN. Like the revolution we had.

Judge SOFAER. Yes, like the revolution we had, but somewhat different. It was somewhat different, even then, even recognized then by President Washington, Alexander Hamilton, James Madison, and ultimately Thomas Jefferson.

Senator BIDEN. Isn't it true, Judge, that, in fact, the comparison you are making is not appropriate, that this particular treaty that you are asking us to sign onto is considerably more restrictive than the European one that you are referring to?

Judge SOFAER. No, I don't think it is considerably more restrictive.

Senator BIDEN. Well, when my turn comes, I will point out how it is.

Senator TRIBLE. Senator Biden, you will have that opportunity.

Judge SOFAER. I would certainly like to hear it.

All I can say is that there are some who have reserved on that treaty, and have done so for technical reasons, such as Switzer-

land—not because they are opposed to this kind of regime as a matter of substance.

Senator TRIBLE. The application of this kind of regime, according to your statement, is one that would be broad based; that is, the purpose of the administration is to negotiate this kind of agreement with other nations as well?

Judge SOFAER. Definitely.

We are in the process of negotiating this kind of agreement with other nations, where we feel that it is a matter of principle. It has nothing to do with the United Kingdom or the IRA. We think that we should not be a sanctuary for people who engage in these kinds of acts of violence.

Senator TRIBLE. Thank you.

Senator BIDEN.

Senator BIDEN. Thank you.

Let me ask you this, Judge.

First, Judge, I did not get a chance to hear your whole statement. I have read most of it and caught the tail end of it. Is there any circumstance that you can envision where the use of violence would fall within the context of being a political offense?

Judge SOFAER. Yes, I think there might be, Senator Biden.

Senator BIDEN. Can you give me an example?

Judge SOFAER. If what you are asking is are there circumstances in which, technically speaking, someone would lose the opportunities of invoking the political offense exception under the new regime we are suggesting, in which the Executive would, nevertheless, exercise some remedy and recognize that that person should not be extradited—is that the gist of your question?

Senator BIDEN. That is not what I am saying. Well, it may be what I am saying, but I don't understand your rephrasing of my question. Let me state it again.

Are there circumstances under which a person could commit a violent act in a third country, flee to the United States, whereby, as a matter of law, the judge sitting in this country would be able to conclude that that violent act constituted a political offense, ergo, the person was not extraditable?

Judge SOFAER. A violent act covered by the categories in the treaty.

Senator BIDEN. He shoots somebody, hits him in the head, anything. Forget the treaty. Forget, for a moment—well, yes, I'm sorry.

Judge SOFAER. Yes; there might be some violent acts that are not covered by the treaty, I don't know. But most of the violent crimes are covered by the treaty, and the answer is "no."

In terms of the treaty with the United Kingdom, anyone who acts in that way would not be entitled to invoke the political offense exception.

Senator BIDEN. I see.

And that's a good idea, you think?

Judge SOFAER. An excellent idea.

Would you like me to go on and talk about—

Senator BIDEN. No; I'd like you to answer questions.

Judge SOFAER. Yes, certainly.

Senator BIDEN. The second question I have for you, Judge, is tell me, what do you think about the British system of justice as, in fact, it is applied to political dissidents and/or suspected terrorists?

Judge SOFAER. Well, as it applies to political dissidents, there is no more free a nation than the United Kingdom. I know you have seen people allowed to make speeches and engage in other nonviolent political actions. There is no place like the United Kingdom in those terms.

As applied to political dissidents who use violence——

Senator BIDEN. Who are accused of using violence.

Judge SOFAER. Or accused of using violence——

Senator BIDEN. I thought that's how the system works.

Judge SOFAER [continuing]. They are tried, I think that's correct, they are tried in the so-called Diplock courts. And I think that it is important to look at that issue carefully, and I am willing to.

Senator BIDEN. What does that mean, Judge. You sound like the State Department now.

Judge SOFAER. That means that I would like to take about 2 or 3 minutes to give you my answer, rather than 2 or 3 seconds.

Senator BIDEN. Good. Go ahead. Fire away.

Judge SOFAER. The Diplock courts were formed after a period of great emergency in Northern Ireland where people were using violence—not just Republicans, but Loyalists also were using violence—and the Government of Northern Ireland resorted to internment without trials at all. Lord Diplock and a commission were sent to Northern Ireland and they said we cannot continue this practice of internment. We have to have trials in the British tradition.

So, they created courts that went as far as they felt they could in granting the regular practices.

Senator BIDEN. What does that mean?

Judge SOFAER. I'll tell you what it means.

Among other things, and what we have heard about a lot, is the issue of jury trials. There are no jury trials in Diplock courts, clearly.

Now, the reason for that is because jurors could be intimidated or killed. And they made a determination in Northern Ireland that they could not have jury trials.

The Republic of Ireland, has made the same determination. In the Diplock courts, there are many procedural protections that are available to people. An absolute right to appeal, for example, is a privilege available to people in the Diplock courts that is not available to ordinary criminals.

I would tell you from my own experience that where you have a judge who has to make findings and conclusions in writing, or at least in a written form, that one then appealable by a court as a matter of right, you frequently have more of a protection, more of a rational process, than you would with a jury. And many people have, in fact, waived juries for such situations.

Senator BIDEN. Judge, are you aware of the debate that is going on in this body right now about South Africa and their judicial system? Are you aware how upset we are as a Nation about the way in which the South African Government not only exercises the

policy of apartheid, but the system by which they exercise the judicial powers of that government? Are you aware of that?

Judge SOFAER. I am aware of that, and I don't see what that has to do with the United Kingdom.

Senator BIDEN. Well, let me tell you.

Judge SOFAER. I would like to tell you that Judge Sprizzo, and I quoted him in my testimony, considered this issue. He even ruled against us on the political offense issue. And he, an American Federal judge, found that the Diplock courts were perfectly fair.

Prime Minister Garrett Fitzgerald, if I may say what he said about this: "We do not have trial by jury in our country for terrorist crimes. That has not been possible in any part of Ireland for over 10 years because trial by jury means that the jurors' lives are threatened, and, in the past, jurors and their families have been murdered."

Senator BIDEN. You know, Vorster of South Africa, the long-time head of the South African Government, said one that he would trade every provision in his emergency decree for just one special powers act, which is what governed Northern Ireland for 50 years. Are you aware of that, if we are going to trade quotes about who thinks what is good.

Judge SOFAER. Well, we have never said that the Diplock courts are good.

Senator BIDEN. What have we done about it, though? Have we protested internationally?

Judge SOFAER. We have pointed out in our human rights reports on an annual basis that there are courts there that do not have jury trials. We have urged the British to keep considering this. The British have a 6-month rule. They reconsider this every 6 months. Their own Whitelaw Commission——

Senator BIDEN. They come up with the same consideration every 6 months.

Judge SOFAER. Well, so far. So far.

Senator BIDEN. Well, Judge, I want to be up front with you.

Judge SOFAER. I want you to know, Senator, that in the last year, 1984, in trials, actual trials of people in the Diplock courts, the nonjury courts, 53 percent of those trials resulted in acquittals.

Senator BIDEN. Judge, I want to be up front with you. I don't know whether we are going under the 10-minute rule. I would guess we are, so my time is about to be up. I will be back again. But I think this extradition treaty is an opportunity to do what we have been unable to do so far. There is an incredible reluctance on the part of this Government to criticize one of our closest allies for what I believe to be an absolutely outrageous position which they have continued to maintain with regard to Northern Ireland and an unwillingness on the part of the present Government to do anything constructive about it, that is, the British Government.

So I want to make it clear to you that I am going to do all that I can to hold this up as long as I can to make the case.

I am inclined to vote for a treaty like the one you propose. But I think it is somewhat disingenuous on the part of the State Department to come forward with this now and, No. 1, make the analogy that it is really no different than the European covenant that

exists now and, No. 2, to suggest that this is the only and the most important thing.

I am delighted to go forward with this treaty as long as we are also going forward at the State Department and in this Congress with, at a minimum, verbal sanctions of the situation that exists within the British Government with regard to what they are not doing in Northern Ireland.

I have many questions and I will be back. I will probably have questions for months and months on this treaty.

[Applause from the audience.]

Judge SOFAER. Well, Senator Biden, I can imagine what your concerns are motivated by, and all I can say is that I will try for months and months to answer those questions.

Senator TRIBLE. The spectators are admonished that, although emotions run strong on issues before this committee, they are invited to be here and to be a part of this process quietly; and that eruptions such as these cannot be tolerated. In the future those individuals will be asked to leave and will be escorted through the door.

Senator Pressler.

Senator PRESSLER. Thank you very much.

First of all, I want to thank both of our witnesses for their thoughtful presentations. I think the two people at the desk represent the best in our system. They are struggling for answers, and they have made presentations here today that are scholarly and thoughtful. I commend you both, not only for your presentations here but for your service in our government.

Let me say that we cannot let emotions rule this particular issue. We have to try to listen to one another and to learn.

Recently, when there was a discussion of terrorism and I heard the charge, the situation at the Athens airport that the United States is asking its allies to adopt more steps to offset terrorism in the world. Because we live in an age when it seems that terrorism is the method used to carry out warfare, we must take such actions.

Let me say that I have also met with and discussed this issue with many other people including Prime Minister Fitzgerald of Ireland. I think we have to come to grips with this problem. Currently, I am a strong supporter of this treaty, but I do want to continue to listen.

If we do not adopt this treaty, if we delay, what position will that place us in? Will we be meeting the same standard we are asking our European allies to meet?

Judge SOFAER. Definitely not.

This treaty is the minimum baseline standard for a civilized nation to take.

As I have said, we are obliged, if we are going to go out and ask our allies to cooperate with us, and those who are not our allies to cooperate with us in this fight against terrorism, we are obliged to go this first step and say that in a democratic regime, where you can seek your aims through nonviolent means, and where there is a fundamentally fair system of justice, you must not use these violent means, and you must not engage in internationally recognized criminal behavior, such as hijacking, and bombings, and killing of

diplomats, and killing of law enforcement officers is hardly any better. We certainly do not regard the killing of our law enforcement officers lightly.

So, Senator PRESSLER, I think it really undercuts us tremendously. To be able to go out there and argue for better security here or better cooperation there and not be able to pass a treaty like this would be a devastating blow.

SENATOR PRESSLER. Would each of you describe to me what our situation will be if we do not approve this treaty?

For example, our government has put a lot of pressure on the Government of Greece to take greater steps to prevent the harboring of terrorists. We also have put a great deal of pressure on the Government of France. The President has given speeches on terrorism. We have been preaching to the world.

If we do not adopt this treaty, what legal status, what legal differences will there be between the treaties we have and the other treaties in the Economic Community of Europe?

JUDGE SOFAER. We now have a political offense exception in place. It has been very broadly interpreted in recent years. There was no need that it go that way. It has gone that way in the courts.

Now, we think, first of all, that there is a moral issue there that we have to deal with. But, beyond that, the political question that you are asking, how does this really undercut us vis-a-vis other nations, well, think about a Lebanese court refusing extradition for the murderers of Robert Stethem on the political offense exception ground. We are in no position to complain if this is going to be our rule when other nations make it their rule. They'll say that the Shi'ia have been oppressed for hundreds of years. They'll say that the Shi'ia are in a revolution in Lebanon to try to get their fair share of power. They took this aircraft as part of that revolution. They killed a Marine, this supporter, this Navy man, who is a military man, as part of the United States, and the United States has been part of the oppressive regime against Lebanon—that is part of their line. You can just as easily imagine a Lebanese court invoking the political offense exception in those circumstances as it is construed in this country, in recent decisions.

We cannot afford to face the world with that kind of law in our cases. The political offense exception did not have to be construed that way. In its origins, it has to do with pure political activity, and this broad application of the political offense exception to common crimes in the midst of political uprisings or activities or for political ends has never been accepted in the international community with one voice.

There have been statutes that modify it, treaties that modify it, decisions that modify it. So this treaty here is perfectly consistent with many other efforts in many other countries over time to modify those rules which, incidentally, grew up, as I said, at a time when the people who were fleeing were fleeing from countries that did not have the vote. You could not even verbally express your opposition to a regime without committing seditious libel.

So, we are living in a different world now, where it is asserted, as part of the Third World rhetoric, that every time we use force for freedom it is perfectly OK; that we are, like armies, entitled to all kinds of rights, and this is one of the rights that we are entitled to,

to shoot policemen or engage in other types of violence in order to get freedom.

We say that we do not agree with that philosophy. We do not agree with it at the U.N. and we do not agree with it, I hope, in the U.S. Senate.

Mr. JENSEN. I would just say that, in addition to the philosophical and moral considerations, mechanically, if we do not adopt the treaty, we would be in a situation where a fugitive who commits such a violent offense, who goes to those nations in Europe who have been a part of the convention, would be extraditable for that offense. It would not be considered a political offense. But it would be so considered here, and this would then be a country of choice for such a fugitive.

Senator PRESSLER. I want to thank both of you again for your analysis. As far as this Senator is concerned, if we are going to ask other countries to meet certain standards regarding terrorists, we have to meet them ourselves. I think we should do so quickly, and I hope that this treaty is brought to a vote soon.

I thank you very much.

Senator TRIBLE. Thank you, Senator Pressler.

Senator DODD.

Senator DODD. Thank you, Mr. Chairman.

First of all, let me express my gratitude to you, Mr. Chairman, for your willingness to hold a second day of hearings in September, when we will be able to hear from other witnesses on this issue as well. That is extremely valuable and worthwhile.

As one member of this committee, I am grateful to you for that.

Mr. Chairman, I missed the opportunity at the outset, so, if I could, I would like to take about 2 minutes to make a short opening statement, and then I will have some questions for the witnesses.

Senator TRIBLE. Please. Your opening statement will not count against your time, Senator Dodd. So, wax eloquent.

Senator DODD. Thank you very much.

Mr. Chairman, the recent decision by the United States and Great Britain to all but eliminate the political exception provision in the existing bilateral extradition agreement requires careful review and examination by the Senate Foreign Relations Committee.

This decision, as contained in a special protocol to the extradition agreement, raises a number of very serious legal questions concerning some of our most fundamental political rights and freedoms.

The right of political dissent is the bedrock of the American democratic experiment. It must be fully preserved and fully protected. Any decision that would detract from it must be viewed with great skepticism and suspicion.

These are the kinds of concerns raised by the protocol signed by the American and British Governments. Obviously, they will be felt most immediately by the Irish community in this country, but the ramifications and precedent-setting nature of this protocol go far beyond the question of Northern Ireland.

The United States has long welcomed political exiles and refugees from around the world, from Ireland to Vietnam, from Poland

to Chile. It is a tradition we can be proud of and one that we recognize in our extradition agreements by excluding political offenses from the list of punishable crimes in such agreements.

Terrorism is, of course, a crime against humanity, and terrorists must be brought before the bar of justice. But in our determined quest to deal with terrorists, we must guard against any effort that seeks to short-circuit the Constitution and the political freedoms guaranteed by it.

These considerations demand that the extradition treaty protocol, signed on June 25, by the United States and Great Britain, be carefully scrutinized by this committee and the Senate as a whole.

Mr. Chairman, it seems to me that the fundamental question here that must be guarded with due diligence is whether or not such an agreement, while it may appear in the short-term to assist us in specific political situations, not violate or bend or in any way fracture the fundamental ideals and values which have guided this country for 200 years. The temptation is strong in these kinds of situations to make exceptions. But our responsibility as stewards, as members of this body during however brief a time we serve here, is to see to it that, while the temptation may be strong, not to violate our fundamental principles.

Certainly there are situations all across this globe that would warrant, I suppose, neglecting some of our values for the expediency of dealing with the factual situation before us. But our job is to see to it that we not be lured into such decisions which could do irreparable damage to that value system, and create exceptions which would embarrass this country or cause even further fractures in the days, months, and years ahead.

I welcome the testimony of our witnesses before us. I would like to address several questions to them, if I could.

One has to do with the offenses that we have identified in Article I of this agreement.

First of all, I would like to ask the witnesses whether or not it was the position of the Justice Department and/or the administration to support the McClure-Volkmer amendments to the gun control legislation of 1968.

Are you familiar with that, Judge?

Judge SOFAER. No.

Mr. JENSEN. That was a matter which, actually, the Treasury Department spoke to. The Justice Department did not take a position on it, and the Treasury Department did, at least in some of those areas.

Senator DODD. Well, you would not argue with me if I told you that the administration was supportive of those amendments.

Mr. JENSEN. I'm saying that they were. That's correct.

Senator DODD. They were supportive?

Mr. JENSEN. The Treasury Department, yes.

Senator DODD. I would be curious to see whether or not the Justice Department would offer or support legislation—and I would love to know the reaction of the National Rifle Association—that would set as a crime the possession of a firearm or ammunition by a person who intends, either himself or through another person, to endanger life.

I find it somewhat incongruous that we would be calling for such a provision in this protocol. Yet, I don't believe this administration would ever propose such legislation for domestic consideration.

Judge SOFAER. But this protocol will not create a crime. Unless there is a crime that fits the definition of the protocol, there is nothing to extradite on.

Senator DODD. Well, I still would be curious to see the reaction of the administration to domestic legislation along those lines. I know of nothing in our present statutory language which includes such a crime at all, or the use of a firearm by a person with the intent to resist or prevent the arrest or detention of himself or another person—which is subparagraph 2 of that paragraph.

Judge SOFAER. Well, I would not be surprised if there are some crimes on the books that would fit within those generic expressions.

Senator DODD. Well, by comparison with article I of the European convention, you mentioned earlier that there was no fundamental difference, and yet, neither of those offenses are included in the European convention on the suppression of terrorism.

Would you disagree with that, Judge?

Judge SOFAER. I don't disagree with it.

I simply say that I don't think it is that significant a difference. We are aiming at violence. We are not aiming at free speech or political dissent in the sense that you approve of it. We are aiming at violence in this treaty.

Senator DODD. Well, there is a fundamental difference between those two conventions, then.

Judge SOFAER. Well, there may be a difference. But I don't regard that as fundamental in the big picture.

Senator DODD. What are your views of the Diplock courts?

Judge SOFAER. Well, we have never expressed a great deal of approval, or any approval, of the Diplock courts. The British Government itself has frequently expressed its dissatisfaction with the Diplock courts.

But we should not refuse to extradite on that ground.

Senator DODD. Now, as a former member of the bar, and as a judge, a distinguished judge, I might add, what are your views of that kind of system of justice? What would you think if someone proposed such arrangements in this country?

We have had our problems in the past, not as profound, obviously, as exist in Northern Ireland.

But what would be your reaction, as a former Federal Judge, if someone proposed legislation which created those kinds of courts in this country?

Judge SOFAER. If we had the kind of problem that they have in Northern Ireland, I would think we would be doing pretty well if we had a system as fair as the one they have.

I can only recite to you what we did with the Japanese in California when we were faced with World War II.

Senator DODD. Do you agree with that decision?

Judge SOFAER. Absolutely not.

I'm just saying that we cannot be so holier than thou.

Senator DODD. It's not being holier than thou. As a distinguished legal scholar, living in a country that has very strong constitutional provisions would you approve of Diplock courts?

Judge SOFAER. I sat down and I read these reports, Senator, about the Diplock courts, and I looked at the provisions. And I think that those courts do not offend those canons of decency and fairness which express the notions of justice of English speaking peoples, which is the standard which we would apply in deciding whether due process was maintained.

I think it is quite extraordinary that they have public trials, for example, because, even more serious than the intimidation of jurors in those cases, was the intimidation of witnesses. Yet, they held the line and they said we are not going to give up on public trials. We are going to have these witnesses come forward and testify and be cross-examined.

There are things that they have done that are questionable, that I don't like, that I wish they could do without, that they wish they could do without. Overall, our judgment is that it is a fundamentally fair system.

Now, there are many, many particular issues. There are issues of the use of accomplice evidence, for example. The way they handle accomplice evidence is really quite familiar to the United States. The Europeans don't like it, but it is something we do all the time. They are very offended at the idea of people coming in and testifying against their own former cohorts. It's not just the Republicans, but also the Loyalists. They are very offended by that. But, in our courts, that happens all the time. It just so happens to be that in Europe, particularly in that area, they regard that as a form of treason by their former revolutionaries.

Senator DODD. Well, speaking about the witnesses now, do you approve of a system where you can have one witness, an uncorroborated witness, testify against a defendant and that be grounds enough to convict someone?

Judge SOFAER. Absolutely. We do it every day. It's a rule in America. We can convict people on uncorroborated testimony.

Senator DODD. I'm not talking about a jury trial, now.

If you had a defendant in front of you, and you had one witness, an uncorroborated witness, who testifies to the guilt of the defendant, you would be satisfied that that was enough?

Judge SOFAER. I might be, if I believed that witness beyond a reasonable doubt.

There was a judge in Northern Ireland who had such a situation with 35 defendants on trial, and he acquitted; he said I don't believe this witness and I am going to acquit these 35 people.

Senator DODD. I'm talking about the system.

Judge SOFAER. Yes, I understand that.

Senator DODD. I understand that a good judge may decide to do something differently. But I am talking about a structural system that I happen to believe is fundamentally flawed. It's not a matter of individual cases. We can all recite horror stories back and forth.

Judge SOFAER. I agree with you there are flaws. But the difference is I don't think it is fundamentally flawed. But I agree with you that there are flaws.

Senator DODD.—Is it wise for this country, then, for this Senate, to give its advice and consent to a treaty which could subject people to an abusive court system, in a retroactive fashion?

Judge SOFAER. Well, the retroactivity issue is a different one and I would be happy to address it.

But I don't think it is an abusive court system. If I did, I would agree with you, that we should not ratify.

I do not regard this to be an abusive court system. I have looked at it, I have looked at the reports about it, I have looked at the results—the conviction rates and acquittal rates, Loyalists, Republicans, jury, nonjury—everything indicates that it is not an abusive judicial system.

Judge Sprizzo, who agrees on the political offense exception issue with the opponents of this treaty, went through the record and specifically found in a very articulate statement that there is nothing wrong. Here, I will read it to you.

Senator DODD. Well, let me ask you this.

Judge SOFAER. Oh, I'll spare you.

Senator DODD. No, I'll accept that. But would you like to see this kind of treaty adopted as a boilerplate language for all extradition treaties around the globe?

Judge SOFAER. Absolutely not.

Senator DODD. Why not?

Judge SOFAER. Because there are nations with whom we will not make this kind of treaty.

Senator DODD. Why not?

Judge SOFAER. First of all, most significantly, there are nations where there is no open system of political opposition and dissent. Second of all is where the system of justice is fundamentally unfair. We would not make this kind of treaty with those nations.

The beauty of this method, going treaty by treaty, is it gives me a chance to look at that and tell the Secretary whether I think we ought to go ahead. We are negotiating with at least three countries right now. And then, it gives you a chance for saying whether you agree.

Senator DODD. What are the three countries, by the way?

Judge SOFAER. I would rather not discuss it in public because those negotiations are going forward. But I would be happy to tell you what they are. They are allies. They are allies of the United States.

Senator DODD. But, don't you see the danger in developing, through the treaty format, the treaty procedure, where we change, based on whatever the immediate relationship may be, the ratification of a treaty, the significance of a treaty, the kind of vote it takes—it takes a super majority to have a treaty approved by the U.S. Senate, not just a simple majority. So we attach great significance to treaties.

And yet, what we are doing here is trying to deal with a narrow fact situation that presently confronts us.

Isn't it wiser for us to have a broad procedure and policy with regard to extradition in the area of political offenses, given the nature and the history this country has in that regard, than it is to go off on an ad hoc basis and try to write specific treaties, adding

and subtracting language, where we find the political situation fits?

Don't you see the danger in proceeding in that fashion?

Judge SOFAER. No, I don't. I don't see any danger. I think it is a safer way to proceed than a broad-scale revision of the political offense exception.

That remains in place. To the extent that you say it is a part of the bulwark of freedom, I don't think it was designed or intended to convey rights on people. But, to the extent that you believe it is part of the bulwark of freedom in America, it stands there.

The beauty of going by the treaty route is that we make exceptions on a nation by nation basis after a considered judgment and after we have managed to convince enough Senators to go along with us.

I am willing to take that burden.

I am telling you that this treaty makes sense. It is addressed to the kind of violence you, yourself, have repeatedly condemned. That is the only kind of conduct that we are reaching with this treaty.

We are not reaching political dissenters. And, moreover, Senator Dodd, I want to assure you of one thing. We are not going to enforce this treaty with our heads in the sand.

I understand from this Senate's prior consideration of this whole issue and reading its report the sensitivity of these questions. The Secretary of State is not going to change into a monster after this treaty is passed. The United States is not going to change into an ungenerous, mean nation.

We are what we are, and we are going to stay that way. If we see a grave injustice occurring to a Republican Irish, to anyone, we are not going to let it happen.

Just because there isn't a political offense exception for a violent act—Senator Biden had asked me earlier about this—doesn't mean that extradition will occur. If someone is making a speech and someone comes up to clobber him or to prevent him from speaking, and he strikes out in order to defend himself, that man is not going to be extradited.

Senator BIDEN. How about if he pulls out a gun and shoots him?

Senator DODD. Judge, let me just say this, and then I will yield to my colleague from Delaware.

In this particular regard, and in similar matters, and this goes far beyond the question of Northern Ireland, in this Senator's mind, anyway, because I see not only that situation but others emerging. For instance, there is the extradition treaty with the Philippines. I don't know what the status of that particular one is, but there has been a similar request pending for some time.

Judge SOFAER. That is not going anywhere.

Senator DODD. Because we are a little uneasy about that situation, aren't we? See how quickly it changes.

Judge SOFAER. But it doesn't change.

Senator DODD. My point is this. There is a substantial burden, a substantial burden of proof, that I feel the administration and the State Department have to make, and, as far as this particular member of this committee and this body is concerned, I would rather err on the side of caution in this regard, until that burden

can be fully and absolutely met—and, with all due respect, I am not satisfied yet that you have met that burden.

I understand that my time is up.

Judge SOFAER. I would like an opportunity to write something, Senator Dodd, for you on the Diplock courts and on the issue of retroactivity, if you wish. I don't want to take any more time.

Senator DODD. I would be delighted to have that.

Judge SOFAER. But I have an answer on the issue of retroactivity. Just briefly speaking——

Senator DODD. And the statute of limitations, that other change.

Judge SOFAER. The statute of limitations is a totally insignificant change. I have heard about that concern. That was not intended whatsoever to have any bearing——

Senator DODD. Then why didn't we leave it the same as in the other one?

Judge SOFAER. It doesn't make any sense the way we used to write our statute of limitation provisions in all treaties. We are changing them everywhere. In all of these treaties, we are changing the statute of limitations provision.

Senator DODD. Why is it insignificant that a person residing in this country should not take into consideration in an extradition matter the statute of limitations on the crime for which the person is being charged in the extraditing document?

Judge SOFAER. I say it is insignificant because if a person is a fugitive in this country, the statute of limitations would be tolled. There is a specific case on point that says even while you are seeking their extradition the statute of limitations is tolled.

So, for that whole range of activities, I would be happy to address it further. But I can assure you that we are not motivated whatsoever by any mean purpose in that regard.

Now, with respect to retroactivity, I just want to say that the general principle is that treaties are retroactive. Judge Friendly has said so in a reported decision, and our general practice is that treaties are retroactive.

With respect to the ex post facto objection you have to keep in mind that we are not making the treaty apply retroactively in terms of the acts. The acts here were criminal when they were committed in both jurisdictions. There is no ex post facto issue. Murder was murder in 1973 in England, it was murder in 1973 in the United States.

As to the retroactive application of the extradition rule itself, the courts have clearly stated that that is perfectly permissible. It does not violate the ex post facto clause. And, on the basic issue of fairness——

Senator DODD. Well, I suspect, judge, that there are some people in Britain who would probably like to go back to the Easter Rebellion, if they could, and retroactivity, given some of the statutes of limitations on these things, would allow them to go back that far.

Judge SOFAER. Well, I suspect you are right, and I join you in fighting that.

Senator TRIBLE. Gentlemen, this is an interesting colloquy, but let us pursue the matter in written form, Judge Sofaer.

You are invited to amplify the record if you would deem that appropriate.

[See appendix.]

Senator TRIBLE. Now let's let Senator Kerry have his opportunity.

Senator KERRY.

You can yield your time, if you wish, of course, to any of your colleagues.

Senator KERRY. I would ask my colleague if he wishes that.

Senator DODD. I would just make one unanimous consent request, Mr. Chairman, if I could.

There was an article 2 days ago in the Washington Post about the BBC cancelling a documentary on Northern Ireland. This is an unprecedented action by the government. Apparently some pressure was brought to bear on the BBC. I think this ought to be a part of the record. It is something that reflects a bit on what we are dealing with here.

I would ask unanimous consent that that be made a part of the record, and I thank the Senator for yielding.

Senator TRIBLE. Without objection, it is so ordered.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Thank you, Mr. Chairman.

I should say, I suppose, at the outset that I share deeply the concerns of the distinguished Senator from Delaware, the Senator from Connecticut, and others who may or may not have addressed questions in the course of this hearing. I must confess to you that I find it somewhat puzzling. I know this committee has spent a great deal of time discussing the Genocide Treaty and the possibility of reservations with respect to that treaty, and the Senator from North Carolina and others have taken great pains to talk about the need for the United States to not expose its citizens or, indeed, people who might be protected by our laws to laws of other countries which might put them at greater jeopardy, or at risk, or somehow expose them beyond what we would wish to expose them to.

I cannot help but feel that there are sections here, particularly (j) and (h), which open the door for that possibility.

I would ask you, Judge Sofaer, if you could perhaps tell me something. In your talking points supporting this supplementary treaty, you state that the United States was basically taking a practical step, putting us into harmony with the 1977 European convention on the suppression of terrorism.

Is that accurate?

Judge SOFAER. Well, I just say that that is an analogous step for modifying what is the excessive application of the political offense exception.

I just point out that there are many modifications that have been adopted by civilized nations all over the world. Ever since we have started having democracies in the world, where you can express your point of view through peaceful means, nations of the world have been cutting back on the political offense exception insofar as it relates to common criminal activity, violent activity. That was one of them. That was a major step. And we did look at that model.

Senator KERRY. And it is your perception that this places us in harmony with that model.

Judge SOFAER. Yes, in principle.

Senator KERRY. Now, how many countries have ratified that convention, do you know?

Judge SOFAER. I promised that I would get a detailed study of that done. At least seven. Many have ratified it. At least seven have ratified it without any reservation whatsoever on the political offense exception rule.

Senator BIDEN. I think it is six, Judge.

Judge SOFAER. Well, your committee count was six. I counted seven last night, just looking quickly.

I can tell you that Switzerland's reservation is strictly technical. They don't like to tell their courts directly what to do, but their courts apply the rules of the convention.

Now, I don't know where it will come out when you total it all up.

But, is it the right change? Of course it is. Of course it is the right change. It is the right way for us to be. We should not be approving of violence. You don't approve of violence in the expression of political ends in a nation where you can express your views through nonviolent means.

Senator KERRY. Respectfully, I don't think the issue, Judge, is so much whether or not anybody here, by approving or disapproving of this language, approves or disapproves of violence. I think that is *prima facie* with respect to all of us.

There is not anybody here who does not disapprove of violence.

The issue is this: Is there terminology, are these sections written in such a way so that they may, somehow, diminish the ability of words to protect human beings?

I think, when you have questions of intent, I mean, the issue of intent here is totally unclear.

Wouldn't you agree with that? I would. As a former prosecutor, god knows, having had some unfortunate cases dismissed for lack of an ability to show intent, I am concerned about the issue of what kind of intent somebody can conjure up with respect to this section.

Judge SOFAER. Well, I would only say that this language of this treaty does not establish any offense. There has to be an offense that fits within one of those categories. Then you have to look at that statute to see what are the requirements of that statute.

This treaty cannot create criminal offenses. It is describing certain kinds of offenses, and there has to be an underlying offense that fits it.

Senator KERRY. Well, I am not sure the language supports what you are saying. Section (k) says, "damaging property with intent to endanger life or with reckless disregard" as to whether the life of another would thereby be in danger.

Now that is a Pandora's box.

Judge SOFAER. Well, the extraditable offenses are established under the other treaty, the 1972 treaty, and this sort of incorporates it in generic manner.

Senator KERRY. But generic carries with it great dangers. That is precisely the point I am trying to make.

I don't think we should be dealing in the generic.

Judge SOFAER. It has to be an extraditable offense. You cannot get started with the extradition process without an extraditable offense being cited. And then the magistrate has to determine that

there was probable cause that the extraditable offense—not that (j) was violated—but that the extraditable offense occurred.

Senator KERRY. I understand that.

Judge SOFAER. That does not change.

Senator KERRY. I understand that.

But this affects the ability of somebody with respect to what they can claim as an excuse, or legitimization, if you will. We have justifiable homicide and we have nonjustifiable homicide.

What we are asking somebody to do here is to make a determination as to the justifiable aspects of it.

Now, that does pertain as to whether or not that human being is going to be subjected to a trial for the principal offense. That determination has to be made.

What we are trying to decide here is the language which will govern that determination.

Judge SOFAER. And I think this language is entirely appropriate to govern that determination.

Senator KERRY. But it involves a determination of intent, doesn't it?

Judge SOFAER. Well, the magistrate has to find that there was probable cause to believe that as well—no, not just probable cause. The magistrate has to make findings that this would be met.

Senator KERRY. But why are you supposed—

Judge SOFAER. No, no. Senator, really, this is not the standard by which the magistrate will act. It is a question of law. It would be a question of law. Does this language incorporate "X" crime and, therefore, does the person lose the right to assert the political offense exception? That is what this language would be used for, as I understand it.

I think the language is entirely appropriate for that purpose.

Maybe Mr. Jensen wants to refer to it.

Mr. JENSEN. I think that the issue is that you have to distinguish between the offense, which is extraditable in the first instance. There has to be a threshold determination that it is extraditable.

Senator KERRY. Right.

Mr. JENSEN. That obviously would involve any number of offenses, which would include intent in any circumstances—a murder would or any other criminal offense would have that as a part of its original definition.

But once you have decided that this is an extraditable offense within the treaty, the next issue is whether it is excluded because of the political offense exception.

This language modifies the political offense exception.

So, as the judge says, after you have made the threshold determination that it is extraditable, then you use this language.

Senator KERRY. I absolutely understand that. But to me that is not the problem here.

The problem here, obviously, is under what conditions are we willing to establish a process, what are the conditions of that process by which people may be subjected to trial for an offense that we may not consider as such, or that maybe sending to be tried for reasons that we would not ourselves try them.

The issue is is that something that we would want to do? Is that something we would do?

Mr. JENSEN. But we considered that in the original treaty itself, as to whether or not we would extradite in the first instance. All this is is withholding extradition for an offense which otherwise we would extradite for.

Judge SOFAER. We would extradite for these offenses. We ask people to do that all the time. These are the core offenses of terrorists around the world. That is what this treaty is about.

Senator KERRY. Would you accept a treaty which were to track verbatim the European convention?

Judge SOFAER. We have this treaty. We negotiated it. We think that it is the right language. I don't think that it is really something that I could address, would we accept that. This is what we have accepted.

I think it is right. I think it is the right language, it has the right purpose, and it does not eliminate the role of the judicial system. The judicial process continues. The judge still has to make the probable cause determination on the underlying offense, and then the judge has to make the determination that this language eliminates the political offense exception because the crime on which the person was found extraditable fits within one of these categories.

It is a proper judicial process. We just do not agree that the results that we have been reaching are the correct results with respect to violent terrorist activity in a country which has political freedom.

Senator KERRY. I see that my time is up. I didn't realize that. I apologize, Mr. Chairman.

Senator TRIBLE. Senator Lugar.

The CHAIRMAN. I have no questions.

Senator TRIBLE. Senator Pell.

Senator PELL. No questions.

Senator TRIBLE. Senator Biden.

Oh, excuse me. Should we permit your colleague who has not had an opportunity to question yet to go ahead.

Senator BIDEN. Sure, go ahead, Ed.

Senator ZORINSKY. Thank you, but I have no questions.

Senator TRIBLE. Senator Biden.

Senator BIDEN. Judge, let me make it clear that I don't think anyone here, you have used the phrase several times, "our motivation is an honorable one," when speaking for the Administration.

We don't doubt your motivation. I don't doubt your motivation. I don't doubt the sincerity of what the administration is trying to do. I don't doubt that you truly believe that your motivation is honorable and is designed specifically to deal with a pernicious problem around the world, terrorism, and specifically as it exists with regard to the British Isles.

I don't doubt that.

What I doubt, or what I question, is our naivete. What I question are the generalizations that are made.

Let me just go back and ask you a few specific questions.

You have on a number of occasions this morning made the assertion that what you are trying to do, what you think is wrong, is the

expansion by the American courts of the political provision exception for extradition, and that has to stop. This is what you're after. You said earlier on if the courts, in effect, had not expanded what was basically good language to make it so broad, to not allow extradition in cases where you think extradition should have occurred, we would not have needed the treaty.

Can you tell me how many such cases there are and cite them for the record? If you can't do it now, submit it for the record.

Judge SOFAER. I will submit the citations later, but there are four cases, recent cases, involving PIRA members and Lowell Jensen has described the facts in some detail in his statement in which this has occurred.

There have been other such situations in the United States over the years where results have been reached with which I would be in disagreement and which we would disagree with on this principle.

Senator BIDEN. I don't doubt that. I just would like——

Judge SOFAER. There have been many results overseas with which we disagree on the basis of political offense exceptions as well.

Senator BIDEN. Well, not that, but I mean in terms of the situation in the United States, if either of you gentlemen would submit for the record the number of times extradition has been requested by Great Britain and has been denied on grounds that you think the denial was unwarranted, and those cases in which extradition has been requested and has been granted.

I have a feeling that you gentlemen are going to find in the overwhelming number of cases extradition was granted, and I would respectfully suggest that we may be making a mountain out of a molehill.

But that is my opinion and I know it is not yours.

For the record, I would like submitted all the extradition requests from Great Britain over the last 15 years and the number of times the Justice Department or the State Department believes extradition in fact should have gone forward but was denied.

Senator TRIBLE. Senator Biden, excuse me, but if we can suspend for a moment, I would yield to the Chairman and we can transact some committee business and then return to our hearing.

Senator BIDEN. Sure.

The CHAIRMAN. Would the Senator yield?

Senator BIDEN. I would be happy to yield.

The CHAIRMAN. I apologize for intruding on the question, but let me say that the Senator's time will be protected.

[Whereupon, at 11:27 a.m., the committee proceeded with other business.]

[Whereupon, at 11:34 a.m., the committee resumed.]

Senator TRIBLE. Thank you, Mr. Chairman.

Senator Biden.

Judge SOFAER. Senator Biden, may I just say in response to your last request that we do not keep extradition request files in one place. I have no idea where they are. I will dig up those requests that have been made over the last 15 years for you, but I can't——

Senator BIDEN. I'm sure the British could supply it for us. And I'm not being facetious.

Judge SOFAER. We stand on the case that we have made.

Senator BIDEN. I understand.

Judge SOFAER. We think that those four decisions demonstrate a need for this treaty.

Senator BIDEN. I understand that, Judge.

But, Judge, the strange thing is—I know it is an unusual position for you—you are the judge this time and you are the witness—

Judge SOFAER. I love it.

Senator BIDEN [continuing]. And I am making a request.

Judge SOFAER. I love it.

Senator BIDEN. So do I.

Judge SOFAER. Glad to be here, Senator.

Senator BIDEN. And I hope you accede to the request. And I would make that request for 20 years, not 15 years, when the troubles began in earnest. You can find those. You have 5 weeks to find it, gentlemen. We will be gone for 5 weeks before we get back. There is plenty of time. I am confident you can find them. I am confident the British Government will cooperate with you in that effort.

Judge SOFAER. Well, if you'd like your staff people to come over and help, that would be fine.

Senator BIDEN. No, I'm confident that you are able to do it, Judge. And if you are not able to do it, I am confident that we can wait.

Now I'd like to point out one other thing, Judge, before I get to some specific questions.

You made a very compelling case about how the whole world will look on us if we, in fact, don't ratify this treaty as people who are harboring terrorists and how can we possibly ask for the return of people from whether it be Lebanon or any other country in the world, and then you answered in response to a question from the Senator from Connecticut that, in fact, we obviously wouldn't sign this treaty with other countries, some other countries. So my suggestion to you is that other countries are fully aware of the fact that we would not, in fact, sign this treaty if that turns out to be the case, ratify this treaty, and that this will not be read as a universal acclamation for terrorism.

Obviously, you gave us the example of Lebanon, and I don't suggest that you would suggest we would sign a similar treaty with Lebanon, would you?

Judge SOFAER. We look forward to Lebanon being secure enough—

Senator BIDEN. So do I.

Judge SOFAER [continuing]. Open and free enough to lead us to make that kind of agreement.

Senator BIDEN. I look forward to that, too, Judge, and I look forward to peace and harmony.

I asked you a question. Would you sign this treaty with Lebanon?

Judge SOFAER. I doubt it. No.

Senator BIDEN. I know no.

So, obviously, using Lebanon as an example of how, in fact, the world would look at—and, by the way, I want to point out your

Shiite example, because you use these so glibly and they come off so nicely, but, in fact, I think they are not particular accurate.

In the Shiite example you used earlier, we have an exception in the law right now, a wanton crimes exception. In the case of the Marine who was killed, or the hijacking case, American courts faced with that situation and/or if we had a treaty with another country that was along those lines, it would have to extradite, without any new treaty. We have a wanton crimes exception, are you aware of that?

Judge SOFAER. It would be their law. I'm just saying that a judge over there could refuse to extradite on the facts.

Senator BIDEN. But what does that have to do with this treaty?

Judge SOFAER. It has to do with whether we want to see the standards that have been created in recent years in the Federal courts relating to political offenses of the violent kind committed in democratic regimes continue on the books.

Senator BIDEN. Right. And if they continued on the books, the wanton crime thing that is on the books with us right now would apply if they were going to apply that standard.

Judge SOFAER. No, I don't agree with you, Senator.

Senator BIDEN. Tell me why not?

Judge SOFAER. I think this could be interpreted to be a political offense.

Senator BIDEN. Well, the exception came into being as a consequence of—I forget the young Palestinian's name, who blew up a bus with 30 people. It was clearly political, and that is where the wanton crimes exception came in.

Judge SOFAER. That was one district judge's decision.

Senator BIDEN. Right.

Judge SOFAER. And when you have 500 of them out there, you are going to get—

Senator BIDEN. Those judges are tough, aren't they?

Judge SOFAER. I agree with you.

Senator BIDEN. You can't really count on them. That is life tenure stuff.

Judge SOFAER. That is why we should do it right here in the treaty, in a sensible way, so that we don't have 500 district judges and many more magistrates deciding these individual cases.

Senator BIDEN. Right. I see your point, Judge.

I have been told by the staff that the State Department has posited two rationales for choosing to negotiate this kind of treaty with the United Kingdom, as opposed to with other countries. The two-pronged rationale is that we would only negotiate a treaty like this with countries that, one, have a system of government similar to ours, presumably a democracy with fair and regular elections; and, two, that they have a system of justice that is similar to ours, presumably with a modicum of due process and fair verdicts.

As you have already picked up, some of us are concerned about the second standard here, Judge. It is not my purpose to get into a full-blown analysis at this moment, but it will be later, of Northern Ireland's judicial system, though I know that it differs substantially from our own and that there are deep disagreements about its ability to produce fair verdicts, although there are some who will say it does and others like me who think it does not.

My concern, rather, is that the Northern Ireland judicial system is not at all unlike the judicial system in some other places where I, for one, would not wish to see a treaty apply.

My question is would you please compare the Emergency Provisions Act of Northern Ireland, the Prevention of Terrorism Act in the U.K., with the recent emergency provisions adopted in South Africa.

Judge SOFAER. You mean the ones last week?

Senator BIDEN. Uh-huh.

Judge SOFAER. They have nothing to do with one another. They are not comparable at all.

Senator BIDEN. How is that? Tell me why? I am not saying you are wrong.

Judge SOFAER. I would have to sit down and get them, first of all, and write you an analysis of them, and I will write you an analysis of the Diplock courts.

Senator BIDEN. Well, I would like, for the record, an analysis of a comparison of the Emergency Provisions Act of Northern Ireland, the Terrorism Act of the U.K. and the state of emergency of Martial Law that has been adopted in South Africa, and the Martial Law provisions that are in operations in the Philippines and in South Korea now.

I would like for the record a comparison of those four different systems, if I could.

Judge SOFAER. Well, I will certainly give you a detailed description of the Diplock courts, which is what we have before us.

Senator BIDEN. That's not what I'm asking, Judge.

Judge SOFAER. And I will compare—

Senator BIDEN. My job is to ask the questions and yours is to answer them. If you are not going to do it, say no.

Judge SOFAER. Well, to the extent that I can and am able to, consistent with my duties, I will do it.

Senator BIDEN. What do you mean by that?

Judge SOFAER. Well, I mean, I don't see why we should be having to justify and engage in an analysis of judicial systems—

Senator BIDEN. Because I asked.

Judge SOFAER [continuing]. Of countries—

Senator BIDEN. Because a Senator asked.

Judge SOFAER. If I could just finish, Senator.

You asked me why I don't think it's consistent with my job. I work in the State Department. We have relations with these countries, and I would like to be able to determine the extent to which I want to go into an analysis of the judicial systems of countries with whom we are not seeking this kind of treaty.

Senator BIDEN. The answer is because a Senator asked you to.

Judge SOFAER. Well, I will certainly cover it to the extent that I hope you are happy with it.

Senator BIDEN. Either I'm new to this system, after 13 years, or you're new to the State Department.

Judge SOFAER. I blame myself in that regard, sir.

Senator BIDEN. It is not, I can assure you, an unusual request.

Judge SOFAER. Well, Senator, I ask you to consider what I just said. I am not trying to be offensive in any way. I am simply telling

you that we cannot pass judgment, we should not pass judgment—

Senator BIDEN. Why can't we?

Judge SOFAER [continuing]. In detailed statements about the judicial systems of a variety of countries with whom we have relations, and a lot of issues are going on around the world. I don't know the extent to which I can go into or should go into a discussion of those. That's all I said.

And I will do the best I can.

Senator BIDEN. Fine.

By the way, I would like to submit for the record the European treaty which was referred to, and point out that article II, which would encompass some of what we are talking about here, is, in fact, discretionary. It says, "For the purposes of extradition between the contracting states, a contracting state may decide not to regard," and so on.

I would like to submit that for the record and I ask that it be included in the record.

Senator TRIBLE. It is so ordered.

[See appendix.]

Senator BIDEN. With regard to retroactivity and the statute of limitations, as you know, there have been some questions already raised on the statute of limitations provision in this treaty, or lack thereof, and about the fact that the treaty itself is retroactive. And I may have some followup questions on the retroactivity issue.

But, for now, let me posit this scenario and ask you, judge, to respond.

As I understand it, the only statute of limitations that matters under the supplementary treaty is that of the requesting country. So, if Britain wants somebody here in the United States, they can request extradition, and under this treaty, we would have to honor it, even though the statute of limitations on the alleged offense has run out in this country.

I also understand that the treaty is to be retroactively applied.

My question is this. In the United Kingdom, where the statute of limitations on the kinds of offenses listed in article I is involved, under this treaty, are we going to be placing ourselves in the position of having to extradite old men whose crimes were committed years ago? Would we be obliged by law, if asked?

Judge SOFAER. Well, the treaty, as you said, would make their statute of limitations govern if they are the requesting party, and ours govern if we were the requesting party.

I don't think it would have much of a practical effect because of the principle, and I will give you the *United States v. Catino* as a recent decision in the second circuit, holding that during the extradition process and while someone is a fugitive, including during the extradition process, the statute of limitations is tolled in this country.

So, even if our own statute of limitations were being applied, I don't think there would be that much of a practical difference.

We have adopted that particular provision because we have concluded, as an institutional matter, in recent treaties, and for all future treaties, that the statute of limitations of the requesting party should govern.

Senator BIDEN. Let me be real practical about it.

If there is an outstanding warrant for an Irish Republican who committed an extraditable crime under this treaty that would not fall within the political exception offense in the year 1960, and, in fact, that person were apprehended today, they must be extradited under the treaty, is that correct?

Judge SOFAER. I don't think Britain has a statute of limitations for those kinds of crimes.

Senator BIDEN. That's correct. So they would have to be extradited, right?

Judge SOFAER. Well, no.

They would not be able to invoke—they could be extradited—

Senator BIDEN. They could be extradited, if they fell within the provisions of the new treaty.

Judge SOFAER. And if they failed to get the kind of relief that is always available in these cases.

Senator BIDEN. Which is?

Judge SOFAER. Asylum or a refusal to extradite because of possible persecution motives.

Senator TRIBLE. Excuse me, Senator Biden, but your time has expired. May we give your colleagues an opportunity to ask their questions and then we can get back to you.

Senator DODD. I would yield.

Senator BIDEN. Thank you. Let me conclude my thought by asking you to submit, again, for the record the number of times in the last 20 years the State Department has, in fact, recommended asylum for anyone from the British Isles and the number of times it has been granted.

Judge SOFAER. We have a very dramatic instance of that, and that is McMullen himself, one of the four cases, in which the Government of the United States concluded that he was eligible for asylum. The reason why that was done was because he convinced the courts that the Irish Republican Army would kill him if he went back to Northern Ireland. He was spared, even though he had committed acts as an IRA member that would make him extraditable under this treaty, he has been spared extradition under the asylum doctrine because of humanitarian concerns of the kind that motivate you, I am sure, and that will continue to motivate us in these cases.

Senator TRIBLE. Senator Dodd.

Senator DODD. First of all, Mr. Chairman, I would like to make a unanimous consent request that several pieces of correspondence from members of the other body be included in the record, letters regarding requests to testify on the matter before us.

Senator TRIBLE. Can you be more specific?

Senator DODD. They are letters from Members of the other body—Congressman Hughes, Congressman Manton, those two, letters to the Secretary of State, letters to the chairman of this committee, requesting hearings on this particular matter.

Senator TRIBLE. Without objection, it is so ordered.

Senator DODD. Judge, let me pick up on the last point Senator Biden has raised because it is really central for me, this whole question of the process and the issue of the transitory nature of governments with which we deal. The question having to do with

the statute of limitations, for instance, where we will now, under this particular provision, allow the extraditing country their statute of limitations to dictate whether or not a person could be extraditable, assuming other qualifications have been met.

My concern with that, of course, is that governments with which we deal do change, and, certainly, that a statute of limitations on a particular offense may be at one particular level, and yet, having ratified a treaty with them dealing with these kinds of offenses, they can certainly change the statute of limitations which would allow them to have a longer reach than they otherwise might have, having excluded ourselves as a party to that treaty from having our own statute of limitations to have any implication or any effect at all.

My point is this. I don't know—and maybe the State Department can provide me with this information—of any example where a government having changed or changed its procedures fundamentally there has ever been a subsequent request from any administration to modify an extradition treaty.

For instance, we have an extradition treaty with Chile. That treaty was signed and ratified at a time when Chile was one of the most long standing, serious, and profound democracies in this hemisphere.

Chile today obviously is not. It, unfortunately, went through a very disruptive period where today it has a government that is under military rule.

And yet, during the past 15 years or so of that particular change there has been no request whatsoever from any of the administrations that have been in power since that change in government to modify that extradition treaty. So today we still have the same provisions applying with the Pinochet government that we did with the government of President Frei, when Chile had a democracy and a judicial system that worked.

My concern with the provisions that you and the administration are asking us to adopt here today is that, while Great Britain certainly has a far more long-standing tradition of democracy than had Chile in that particular case, there is nothing that can convince this particular member that the Diplock courts, for instance, could be changed even further, to eliminate the very provisions which you identify as making them tolerable.

And yet, we are being asked to ratify a treaty, which has profound significance given the nature of the vote that is required before one can be ratified.

My concern and question to you is this: Doesn't that raise serious concerns in your mind for us to be adopting provisions in a treaty requiring a two-thirds vote that would allow the extraditing nation, in this case Great Britain, tremendous latitude; and that, in fact, if they did change their system and process, which we might find repugnant, given the long-standing tradition not to modify extradition treaties, we would be submitting ourselves and people in this country to a process that would be violative of the very ideals which I identified in my opening remarks?

Judge SOFAER. I think it is a legitimate concern, Senator.

I think that regimes can change, and if we adopt this treaty-by-treaty, nation-by-nation approach to this problem, which I prefer, it is something which we have to keep in mind.

In connection with nations where we think the traditions could change more rapidly than our regular notice provision that exists in the British-United States treaty, I would think perhaps we ought to have shorter notice requirements with respect to the political offense exception requirements.

I will certainly keep that in mind as we go along.

I think that for this treaty, the regular notice option that we have—that is, we can give notification that we do not intend to allow such a provision to continue in effect after the notice period if things change adversely. Also, keep in mind that, I think, it is a legitimate concern, in short, but I also stress that the sorts of things that concern you and have concerned this committee in the past are going to continue to concern us. I specifically point to those provisions where you noted that the Secretary of State would have discretion to refuse to extradite a person. If when everything is satisfied, all the "I's" are dotted and the "T's" are crossed and it looks like political persecution or it looks like a situation warranting humanitarian exceptions, we are going to exercise discretion, we are going to protect people in those situations.

Senator DODD. Judge, I feel fairly comfortable with you because I am familiar with you and your record. I feel very comfortable knowing that you are there. But I don't know who the next person will be who will occupy your position—5 years from now, 10 years from now, 20 years from now, 30 years from now. Let's hope the situation in Northern Ireland will be behind us by that point.

But you and I do things that live far beyond your tenure or my tenure here, and that becomes our joint responsibility.

Judge SOFAER. But we have a long tradition in this Nation of having Secretaries of State that have exercised these kinds of humane rules, and that is why we have the reputation we have in the world——

Senator DODD. I understand that.

Judge SOFAER [continuing]. Of being the Nation that we are.

Senator DODD. Are there other treaties that have been modified because governments have changed?

Judge SOFAER. Sure.

Senator DODD. Extradition treaties, I am talking about. Are there any examples of that?

Judge SOFAER. I'm sure that there are. This is one, after all.

Senator DODD. Well, I know of none.

Judge SOFAER. Also, you have to remember, as a practical matter, when the government changes, the treaty is there on the books.

We have a treaty with Albania right now, an extradition treaty with Albania. We have not extradited anyone to Albania for a long, long time.

So, the fact that the treaty is on the books does not keep us from exercising our good judgment.

Senator DODD. All right. I thank you.

While I have raised those questions, I have some others in writing that I would also submit.

I have one quick one, a technical question, if I still have a minute.

Senator TRIBLE. Please.

Senator DODD. If the Congress at some future date enacts legislation such as this committee has recommended from time to time, what is your legal opinion—and this may be an answer you would want to submit in writing—if this committee were to adopt legislation such as has been reported by the committee in the past, would that legislation regarding extradition supersede the provisions of this treaty with the United Kingdom?

Judge SOFAER. I would like to think about that.

Would you have anything specific in mind?

Senator DODD. There is a specific bill that was passed out of this committee. I think the language of the legislation is one matter. The question is whether or not the adoption of legislation dealing with provisions that are included in the supplementary treaty, whether or not that legislation would supersede the provisions of this treaty.

Judge SOFAER. I would be happy to answer that in writing. I think it deserves close and careful attention.

Senator DODD. Thank you.

[The information referred to appears in the appendix.]

Senator DODD. Mr. Chairman, let me thank you again for your commitment to have an additional hearing after we come back after the August recess. I thank both of our witnesses today, too.

Senator TRIBLE. Thank you, Senator Dodd. Senator Pell.

Senator PELL. I would defer to Senator Kerry.

Senator KERRY. I have already had a round, Senator Pell. This is our second round, and I would be happy to defer to you.

Senator TRIBLE. Yes, this is our second round.

Senator PELL. Thank you very much, indeed.

I think this whole question revolves around the whole business of one country's freedom fighters being another country's terrorists. It depends on how you look at it.

I was the President's representative at the funeral of an old friend, Lord Mountbatten. I would like to ask you a question.

If his assassin were found right here in Washington, could he not be extradited under the common crime of murder right now?

Judge SOFAER. Are you talking about someone who killed Mountbatten in Ireland?

Senator PELL. Yes; you can only get killed in one place.

Judge SOFAER. He would not be extradited if that were a political offense. If that were determined to be a political offense, he would not be extradited.

Senator PELL. Right. But that is simple murder.

Judge SOFAER. Of course. It is simple murder. But he could say that there is a revolution in Ireland, I am a member of a revolutionary group, and this was an act in furtherance of that revolution.

Senator PELL. Do you believe from your experience that the courts would confirm that?

Judge SOFAER. Yes; yes.

Senator PELL. As of now, what the treaty does is take it away from the courts and give it to the State Department.

Judge SOFAER. I think there are plenty of judges who would buy that argument in this country.

Senator PELL. Really?

Judge SOFAER. Based on what I have seen in the last few decisions.

Senator PELL. Well, I would hope you are wrong.

Then, your point is that, under this treaty, he would be extraditable, is that correct, if we found that individual.

Judge SOFAER. Well, he would not be able to invoke the political offense exception to prevent his extradition. That is all. He would have all the other rights, and possibly might not be extradited, depending on the circumstances.

Senator PELL. I will ask another theoretical question to try to educate me on this. If one of our terrorists in Nicaragua, the Contras, if one of them performed a particularly egregious act of terrorism, as they have, and a request was made for his extradition here, would he be extradited?

Judge SOFAER. Well, at this point, if we have an extradition treaty with Nicaragua—we would have to check that.

[Pause.]

Judge SOFAER. Yes, we have an extradition treaty with Nicaragua. He could not invoke the political offense exception because it doesn't exist in our treaty with—I mean that he could invoke the political offense exception. We have not limited it with respect to Nicaragua. So would a guerrilla in El Salvador, incidentally, be able to invoke the political offense exception.

Senator PELL. But this is going to lead us to a very difficult path, trying to decide which man is a terrorist and which man is a freedom fighter before we are through. It is the same offense, common murder.

Judge SOFAER. But I think we are drawing the right line, Senator Pell. What we are doing is this. We do not approve of violent efforts against a government in a nation where you can use peaceful political means to achieve those results.

Senator PELL. Well, we are certainly not following that rule in Nicaragua.

Judge SOFAER. Well, I don't want to comment on Nicaragua. I can only say that it certainly is the administration's position that there is no free political system in Nicaragua. Certainly I think you would agree with me that it is not comparable to the system that is in Britain.

We are dealing with Britain. We say that they have a free political system, they have a fundamentally fair system of justice, and, therefore, we are going to cut these crimes, these violent crimes, or crimes that we recognize internationally as crimes, out from the group to which you could apply the political offense exception. That is what we are saying.

We could go nation by nation, and if you disagree with our judgment on one of those, that is fair game. I think it is an appropriate subject to talk about.

But we do not think that people in such regimes as the United Kingdom ought to be using violence and violating international principles.

Senator PELL. Nor does anybody in this room. That is why I am surprised when you say that the assassin of Lord Mountbatten, if he is caught here, could not be extradited under present law, or would likely not be extradited under present law.

Judge SOFAER. Well, I think his case is very similar to the four cases in which extradition has been denied under the political offense exception. If you think he should be extradited, you should vote for this treaty.

Senator BIDEN. Will the Senator yield on that point?

Senator PELL. Certainly.

Senator BIDEN. The case you keep citing, let me read from it. It says,

For purposes of extradition, indiscriminate bombing of civilian populace is not recognized as a protected political act, even when the larger political objective of the person who sets off the bomb may be to eliminate civilian population of the country.

The fact of the matter is, in the Mountbatten case, there were four civilians killed.

Judge SOFAER. Yes.

Senator BIDEN. Are you telling me that he would not be extradited under our present situation?

Judge SOFAER. I'm telling you that a District Judge could reasonably take the rules that have existed in these four cases that were decided and say that this was an act to which the political offense exception would apply.

Senator BIDEN. I respectfully disagree, that could not be reasonably done with the civilians killed, in light of the exception which I have read.

Judge SOFAER. And I don't think there is any difference between the killing of Mountbatten and the killings of the law enforcement officers and the captains that are in the four cases that we are talking about here.

Senator BIDEN. Now we are getting down to it.

Judge SOFAER. I just wanted you to know that I don't.

Senator BIDEN. I knew you thought that.

Judge SOFAER. And I think that you seem to, and I am surprised at that because you and everyone else have condemned violence in Northern Ireland against law enforcement officers and civilians alike.

Senator PELL. But wouldn't the Mountbatten case fall within the so-called wanton crimes exception under the existing treaty?

Judge SOFAER. It depends on the judge, or the magistrate.

Senator PELL. Well, when you are accused of a crime, all life depends on a judge.

Judge SOFAER. I don't think that everything has to depend on a judge, Senator. It is up to us here to write what will depend on the judge and what won't, and to give the judge the guidance.

Senator PELL. Thank you very much.

Senator TRIBLE. Senator Kerry.

Oh, Mr. Jensen, excuse me. Would you like to add to the answer? This will not come out of Senator Kerry's time.

Mr. JENSEN. I was just briefly going to say, in reference to this discussion about the wanton crimes exception, that is not a part of any treaty language. The wanton crimes exception is a judicial

kind of interpretation and it does not dictate whether or not the exception for political offense would take place.

For example, in one of the cases we cite, there is a murder of a constable. Now, I would call that a wanton crime. The court denied extradition by calling it a political offense. That is the issue that is involved in a extradition question about someone like Lord Mountbatten who got killed. The same sort of consideration is there.

Senator PELL. If the Senator from Massachusetts would permit me to make another remark here——

Senator KERRY. Of course.

Senator PELL [continuing]. My definition of a freedom fighter versus a terrorist is that a freedom fighter usually aims for military targets, whether they are police officers or whatever they are, but a terrorist goes indiscriminately after civilians. You have to apply that a little bit.

In Nicaragua, our Contras are being pretty indiscriminate, so I would call them terrorists. In many cases in Northern Ireland, they are going after military people, and that is being, I think, less of a terrorist.

I would think this differentiation between who is a terrorist and who is a freedom fighter is a pretty valid one.

Judge SOFAER. Well, Senator, I think if you are going to make that kind of differentiation—and one judge has, at least—you should look at what organization the terrorist belongs to and what has the organization been doing.

You can't just look at one single act in that judgment and say this individual is a freedom fighter because he killed a colonel when everybody he is allied with and the organization that he is fighting with are blowing up women and children and shooting down priests on the church steps and doing all kinds of other things of that sort.

If you make that kind of judgment, make it properly and in a fundamental way, I agree. But I think you will find, then, that you have to look at the laws of war and the Geneva Convention, and when do we recognize that something is a military operation and when isn't it a military operation. These kinds of operations, an IRA operation, is not a legitimate military operation under the laws of war.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Judge, I listened, I thought carefully, to your answer to Senator Pell, with respect to the distinctions between Nicaragua and Great Britain, and I thought I heard you say that in Great Britain these people would be subjected to a very fair system of justice.

Judge SOFAER. To a fundamentally fair system of justice.

Senator KERRY. This sort of confused me because you said you did not want to be judgmental about the system of justice over there, and I gather, then, that you have made an analysis of Northern Ireland's court system.

Judge SOFAER. I have, and I am going to submit to you——

Senator KERRY. You already have made that analysis?

Judge SOFAER. I have; yes.

Senator KERRY. That wasn't what I thought you said to Senator Biden.

Senator BIDEN. He said he has made it in regard to Britain but not with regard to other countries.

Judge SOFAER. We would not have this kind of treaty with Nicaragua, and I have not made that kind of analysis.

Senator KERRY. That is precisely the point that I wanted to get to.

I am not suggesting that you ought to make this treaty with Nicaragua, but I am certainly asking the question why it is you believe it a good idea for a nation that believes in even-handed justice to run around selectively beginning to change a 200-year-old doctrine of neutrality in order to avoid so-called victors justice. And here we are, making a very selective and specialized, clearly directed, choice with respect to Great Britain.

How is that evenhanded? Is it evenhanded?

Judge SOFAER. Well, it is even-handed from our—

Senator KERRY. That's evenhanded?

Judge SOFAER. From our political viewpoint, it is evenhanded. We have beliefs. We are trying to propagate—

Senator KERRY. Well, I'd love to hear the Orwellian terminology that creates evenhandedness out of that: On its face, a different policy for Nicaragua, a different policy for Great Britain. What's evenhanded?

Judge SOFAER. Evenhandedness does not mean you have to be dumb and close your eyes to the world.

We have certain views and values as a nation. We are out there, arguing to people, that they should have democratic regimes where you can express yourself through peaceful means. We are arguing to nations and we are trying to be an example of that.

We think that that is better. We think that nations like that are entitled to better treatment. Yes, I think that we are making that kind of distinction.

Senator KERRY. Well, if you are going to make a distinction, and you talk about being dumb and closing your eyes to the world, it seems to me that when you start to apply standards which are not even crimes in our country, we are bordering on a level of stupidity and beginning to reach beyond even the protections that we afford our own people.

Judge SOFAER. I was just speaking about myself being dumb in the event—I mean, you are telling me that I could not make the distinction. I think that the administration can make the distinction that it makes sense, it is principled, that it is consistent with what we believe and what we ought to encourage in the world. I don't think the political offense exception has ever been applied the way it is being applied in recent years in the Federal courts in these cases.

I think that we should stop this development and make the kind of limited, I think rather conservative, change in this doctrine to prevent it from undermining our credibility in fighting terrorism around the world.

Senator KERRY. What bothers me, Judge—and I am not trying to just pick on this or be unreasonable about it at all—is I think that you get into great difficulties when you ignore what happens with time and when you start to get specialized in your application of the law in this way.

What Senator Pell and others have referred to, one person's terrorist is someone else's freedom fighter, and the variations that cause those definitions to be applied to people, are changing constantly.

Judge SOFAER. Well, the Protestants and the Catholics and the Libyans and anyone else who engage in violence in the United Kingdom is no one's freedom fighter here in the United States.

I know of no official, no public official in the United States, yourself included, who has said that the kind of violent conduct that we would reach with this supplementary treaty would lead to calling any of those people freedom fighters. No one.

That is what this treaty is limited to, that kind of violence. They are no one's freedom fighters. They are terrorists.

Senator KERRY. Well, I think that each of the Senators sitting here is not going to disagree with you with respect to whether or not they would characterize actions taken by some people as terrorism. But, on the other hand, you can't say that they aren't somebody's freedom fighter because obviously they are, and everybody knows that that is precisely what this is directed at trying to prevent—otherwise, why mention ammunition, why mention the flow of arms, why mention the mere possession.

Judge SOFAER. They are somebody's freedom fighters, but you were talking about here, in this—

Senator KERRY. Why did you say they were nobody's?

Judge SOFAER [continuing]. In this room and in this process.

Senator KERRY. But that is the problem. That changes, too. We are not here all the time, and there is a process of change.

I want to get still further into this. I am still concerned.

It seems to me that in my earlier line of questioning we still have not dealt with the total narrowing that you are trying to get at here.

Up until now, most offenses have really been an overt act—you do one thing, there is an overt act—and to that there is no exception. But here, suddenly, we are reaching beyond that, into a realm of intent, where a noncriminal activity in the United States, the mere possession of ammunition, the mere possession of a particular weapon with an intent, but obviously the ability to establish that intent is subject to affidavit, subject to testimony, which I think can be highly suspect under certain situations, and it seems to me you are opening up a whole level of inquiry and of need for proof that is different from anything that has been set up before.

Mr. JENSEN. The difficulty, Senator, of course, is that this does not create any new crimes. It does not now open up for extradition any criminal offense which is not now extraditable.

Senator KERRY. I fully understand that.

Mr. JENSEN. So the whole issue of criminal intent remains the same.

Senator KERRY. But that is not what I am talking about. We are missing the point here somehow.

I understand there is a threshold offense and a determination will be made with respect to extradition as to whether or not an individual has committed that particular offense, and probable cause, et cetera, will adhere to that.

Then there is a secondary level of inquiry.

Judge SOFAER. And the burden of proving intent will be on——
 Senator KERRY. I totally understand that. I understand that. That is as it ought to be.

Judge SOFAER. It is really a protection for the person sought to be extradited that an intent requirement is there.

Senator KERRY. There is a secondary level of inquiry. Having made the determination as to the probable cause with respect to the extraditable offense, there is a level of inquiry with respect to whether or not that person has the right to claim a political exception—correct?

Mr. JENSEN. Only insofar as the offense which is found to be extraditable is then found to be within the language of the treaty.

Senator KERRY. I understand that.

Mr. JENSEN. That is the issue—not the intent of the criminal offender, but whether or not it fits within the treaty.

Senator KERRY. That's correct.

But one of the things that is going to prevent you from claiming that offense is a finding by that court that that individual had the ammunition or whatever with an intent. If the intent is found, the political offense exception is obviated.

So, what I am saying is that you have entered a level of inquiry into this process which regards intent, which, up until now, I have never seen in the extraditable offense processes, and which, by your own admission, neither of you would want applied in most other countries in the world at this point in time—well, maybe not most, but I would suspect most.

Therefore, my original question: Where is the wisdom?

Judge SOFAER. I think you and I will have to work on this together. I am going to get back to you on it and explain to you, in writing, in a letter, how the thing works. I think basically the intent——

Senator KERRY. Well, I am perfectly happy to listen to you now. Are you telling me that I am wrong in how that works?

Judge SOFAER. No; I don't think that you are wrong. I'm just saying that the question, when you look at that, is whether the crime, the underlying crime for which extradition is sought, is one which fits that category. That is the only question.

You are not looking any more into the intent of the individual who is standing before you. You are looking into whether it is a crime which fits that category that involves the keeping of explosives or ammunition with a certain type of intent.

There is no additional factual case specific inquiry. It is an issue of law.

Senator KERRY. But it will be made in a secondary level of inquiry.

Judge SOFAER. Yes, but that is good. That is more protection for the person who is sought to be extradited. He gets a shot at arguing that this is not one of those case.

Senator KERRY. It would be more protection for that person if that section were not in the treaty.

Judge SOFAER. Well, we think where the Government can prove to the judge that it does fit within that section and that he is a person who had guns or bombs with the intention of using them in the way that was set out in that section, and that he is a person

who has been charged with an offense that fits within that category, he should not have the benefit of the political offense exception. That is why we are here.

Senator KERRY. Well, we are here, but we are not talking about the same thing.

The European convention allows extradition without claiming the political offense if you have an offense involving the use of a bomb, a grenade, a rocket, automatic firearm, or a letter or parcel bomb if it endangers a person. But it does not get into an inquiry about intent, for mere possession of ammunition.

That is the distinction. And you are claiming, somehow, that this is going to put us more into conformity with the European convention, and I am stating, plainly and flatly for the record, that I think it goes way beyond the European exception.

Judge SOFAER. I am not comparing this to the European convention right now.

Senator KERRY. Well, you did in your comments.

Judge SOFAER. I think it is very similar in form and in purpose. But the way (j)(1) is written in article I, it gives a generic expression of the kinds of offenses that would be covered: The possession of a firearm or ammunition by a person who intends, either himself or through another person, to endanger life; that is, those offenses relating to firearms or ammunition that satisfy this standard of law will be offenses in which the person will not be allowed to invoke the political offense exception.

I think that is the right rule.

We don't want people who are charged with an offense relating to firearms or ammunition, who intended, either himself or through another person to endanger life, to be able to invoke the political offense exception.

That is why it is written there. Any offense that fits that standard is an offense we don't want to see him able to invoke the exception on.

Senator KERRY. Well, I will not get into some hypotheticals, but I can think of some that would give this country great difficulty with respect to its application of that elsewhere.

I think that is what troubles me.

Thank you, Mr. Chairman.

Senator TRIBLE. Senator Pell.

Senator PELL. I have one question.

In your view, how would you define the difference between a freedom fighter and a terrorist?

Judge SOFAER. I think, first of all, that terrorists do kill indiscriminately. They kill civilians, et cetera. I think it is easier to define who is a terrorist than who is a freedom fighter. Obviously, there are certain political realities and you always say if you win that you are a freedom fighter.

But, if you are asking me as a lawyer in the State Department what is my position on who is a terrorist and who is a freedom fighter, I would say that people who fight repressive regimes that do not give them a chance to change things through the political process at least are eligible to be called freedom fighters; and those who use violence to seek political change, where they really cannot win it at the ballot box, even though the ballot box is there, or they

just don't want to go to the trouble, and they do it indiscriminately, are terrorists.

Senator PELL. So, you don't think the question of indiscrimination is a factor here?

Judge SOFAER. I would eliminate that, yes. I think even if they kill a police officer, he would be a terrorist.

A person here who killed a police officer in order to bring about political change would be a terrorist to me.

Judge Sprizzo tried to distinguish the Black Liberation Army from the Irish Republican Army. He said well, it didn't have as much of a structure as the IRA. I don't think you want the law to develop along the lines that Judge Sprizzo is suggesting, I really don't.

Senator PELL. What I am saying is that a terrorist is a fellow who is indiscriminate—kills civilians, children. In the Lord Mountbatten case, there was a 14-year-old youngster killed at the same time.

Judge SOFAER. Killing Lord Mountbatten was an act of terrorism. That is what I am saying—

Senator PELL. Right, and I would agree with you.

Judge SOFAER [continuing]. Quite apart from the child.

Senator PELL. I would agree. But when a busload of civilians is killed, that would be a terrorist act; but if a police officer, per se, is killed, is that as much of a terrorist act?

Judge SOFAER. Yes; it is. That police officer is a mother or father, and it is murder. It is murder and it should not be done. It should not be approved, and we should extradite those people who do those things where they do them in regimes which permit them to use the normal political processes to bring about change.

The Republic of Ireland extradites PIRA members to Northern Ireland for doing these kinds of acts.

Senator PELL. I guess we just disagree on the question of the components of terrorism and freedom fighting. I still think that if civilians are killed, no matter how noble the cause, it is still terrorism.

Senator TRIBLE. Let me advise my colleagues that it is my intention to adjourn these proceedings at 12:30. Questions have been propounded to the witnesses, and they will respond to those questions during the month of August.

We will have a second day of hearings, and these witnesses can be invited to return on that day and answer further questions.

Senator BIDEN. I think the chairman is correct in that and I will withhold my questions and will just make a concluding statement at this moment.

I am sincere when I say this. I want to thank both the witnesses because I think they have clearly defined in an articulate manner what differences exist at least between me and them. I mean this sincerely.

The definition, Judge, that you just gave to Senator Pell I think is at the heart of why I am so concerned about the treaty.

It is not a question of whether or not I support violence. All of us in the abstract abhor violence under any circumstance at all. I don't like the fact that we dropped the bomb on Hiroshima. I don't

like the bombing of Dresden. I don't like the killing of a cop in this country or any other place. I don't like killing, period.

But what concerns me that this treaty does is this. This treaty, for the first time, will codify what, in fact, we have implicitly agreed to as a nation here, and that is that as long as Great Britain has a system, which I respect, and as the jurisprudential roots of this country are found in it, in fact, other actions that they take, which I find reprehensible—and that is their conduct in Northern Ireland over the past so many years and their conduct in Ireland over the past 350 years—that we will, in fact, forget about that.

For example, had this treaty been in effect in 1939 in India, we would have been able to say, under your standard of terrorism, anyone among the Indians who, in fact, used any violence—and I realize Gandhi did not, but there were many who did—who used violence against British officers, in fact, would fall within the category of terrorism because the British had a system which would fit the category.

Judge SOFAER. But they didn't have a vote.

Senator BIDEN. They had a system of justice that was similar to ours, pursued with a modicum of due process and fair verdicts.

The fact of the matter is—

Judge SOFAER. They had absolutely no access to the political process. They were part of the British Empire.

Senator BIDEN. I would argue that, in fact, the access to the political process for Catholics in Northern Ireland is severely limited, and I would make that case at another time with you.

My problem here is that I would much rather err on the side of an occasional judge making an occasional mistake as a way in which to continue our process of dealing with the question of what constitutes political crimes with Great Britain, than I would to go the route you are wishing to go which, in fact, would eliminate the errors, as you see them, of the four cases.

I might agree with you on all four cases, I don't know. But I would much rather err on the side of a judge making a mistake—just like I continue, as the ranking member of the Judiciary Committee, and having been a trial lawyer, to continue to err on the side of the jury system, which makes horrible, horrible judgments on occasion, which makes exceptional judgments that are beyond all proportion to what, in fact, any of us would consider as justice.

I don't come along because in 2, or 5 or 10 or 15 percent of the cases where juries make heinous verdicts or make serious mistakes and say let us eliminate the jury system.

I would argue that what you are doing here, because you have found four cases in which you believe there are serious mistakes made, is you are eliminating a system that otherwise functions very well, and by doing so, codifying, because of our overall feeling—why, we are the most blind people in the world when it comes to looking at the British. We view them through a prism.

I am very much an anglophile in terms of my background, my study, and everything else. But I also happen to be Irish and I know the history. The fact of the matter is the British have been outrageous in the way in which they have treated them and continue to. The history of the United States in dealing with this, and our willingness to close our eyes, because all the rest of their

system is admirable, to what, in fact, they are not doing or were doing with regard to Ireland, generally, or Northern Ireland, specifically, in fact is one of the problems I have with this treaty.

So, I want to thank you for narrowing the scope, for me at least, of the debate here, and that is that the essence of your position and that of the State Department is because the British have a system which we believe to be fair, that, in fact, we will eliminate the protection that we feel is necessary when it comes to Nicaragua or the Philippines or other countries, that is, the political offense protection, erring on the side of the defendant, the accused.

As a matter of fact, if we sign this treaty, we will have to arrive at the conclusion you have arrived at if we vote for it, and that is that the present judicial system of Northern Ireland is, in fact, one that is basically fair—a notion that I reject totally.

Thank you very much.

Senator PELL. Mr. Chairman, I would hope that the record could be kept open for questions until 6 p.m. tomorrow.

Senator TRIBLE. It is so ordered.

Judge SOFAER. Mr. Chairman, I want to say just one word, and that is that we are doing this as a matter of principle. We will establish that over the years. This Nation has to take the position vis-a-vis all the democracies of the world that we will extradite people who murder and commit other international crimes in those democracies and come running to us as a sanctuary. It has nothing to do with Ireland. We are going to take this position over and over again.

Senator TRIBLE. Gentlemen, enough has been said for this day. Let me conclude these hearings by saying that this hearing has successfully framed the very difficult issues before us. We obviously must weigh the need to combat terrorism, ruthless, wanton acts, wherever they take place in the world against our traditional role as a nation that offers asylum to political dissidents.

You have stated a very persuasive case. Your presentation has been very thoughtful and will be fully considered by our colleagues.

We look forward to the second day of hearings that will take place in September.

It is my judgment that the treaty will be approved by this committee.

The hearing is adjourned.

[Whereupon, at 12:27 p.m., the committee adjourned, subject to call of the Chair.]



UNITED STATES AND UNITED KINGDOM SUPPLEMENTAL EXTRADITION TREATY

WEDNESDAY, SEPTEMBER 18, 1985

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met at 9:43 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Paul S. Trible, Jr., presiding.

Present: Senators Trible [presiding], Pressler, Evans, Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton, and Kerry.

Senator TRIBLE. The committee will come to order.

We are delayed this morning by the late arrival of the mayor of Boston, who is to be our first witness. The other witnesses were on a schedule and therefore it was necessary to delay the beginning of this second day of hearings on the new United States-United Kingdom Extradition Treaty.

On behalf of the Foreign Relations Committee, I want to welcome our witnesses and guests to this second day of hearings.

The proposed treaty would amend the existing extradition treaty between the United States and the United Kingdom in several respects. The most significant change would be in the availability of the political offense exception. Under the new treaty, individuals accused of violent crimes—murder, assault, kidnaping, and the like—would be unable to escape extradition by pleading that their acts were committed in the course of a political uprising.

On August 1 the committee heard testimony on the treaty from Deputy Attorney General Lowell Jensen and State Department Legal Adviser Abraham Sofaer. For the benefit of those who were unable to attend that hearing, I inserted the written testimony of both witnesses in the Congressional Record.

It is my hope that today witnesses opposing Senate approval of this treaty will address the arguments advanced by Mr. Jensen and Mr. Sofaer in their testimony. This will provide the best possible record on which this committee can make a thoughtful decision.

During the administration's presentation, Senators Biden, Dodd, Kerry, Pell, and I posed a number of questions for which we sought written responses. In addition, the staff submitted another 28 questions.

The administration promised they would answer all those questions during the week of September 9 in order that interested Senators would have enough time to review those questions and answers before this hearing. The administration has kept faith with

that request. Last week the committee received lengthy and detailed answers to each question.

The State Department and in particular the Office of Legal Advisor is to be commended for their diligence. Their work will be extremely valuable to this committee.

Today we will be hearing from a large number of witnesses. To expedite matters, I will ask each witness to limit his or her remarks to 10 minutes. We will, of course, see that each witness' entire written statement is made a part of the record.

In addition, I will ask my colleagues today to limit their questions to 7 minutes per panel, with two rounds per Senator. This will ensure that we have an opportunity to ask questions and everyone will have the opportunity to be heard. Additional questions, of course, can be submitted for written replies.

The committee has gone to great lengths to hear from as many witnesses as possible. Realizing that this treaty is very controversial in some quarters, the committee has made a special effort to include as witnesses those who raised questions and concerns about this treaty.

Our first scheduled witness today was the Honorable Raymond Flynn, the mayor of Boston. He has been delayed in his arrival and therefore we will turn first to Congressman Biaggi. My friend and former colleague is most welcome today.

Let me first ask if Senator Evans has a statement or remarks to make at the outset. If not, we will begin.

Congressman Biaggi, you are most welcome.

STATEMENT OF HON. MARIO BIAGGI, A REPRESENTATIVE IN CONGRESS FROM NEW YORK

Representative BIAGGI. Thank you very much, Mr. Chairman. It is nice to see you and see you presiding. We missed you in the House, but we are happy for yourself, really.

I want to thank you and the members of the committee for giving me the opportunity.

Senator TRIBLE. Mario, pull that a bit closer.

Representative BIAGGI. I want to thank you and the members of the committee for giving me the opportunity to speak to you this morning. And I am even more grateful at the developments because timewise I have some constraints. We have a markup in Merchant Marine, where you served with me for some time, and it is a single bill and one which has some controversy attached to it.

This hearing is called for the purpose of producing testimony for a proposed supplementary extradition treaty between the United States and the United Kingdom and Northern Ireland. In the letter I sent to Chairman Lugar, cosigned by 56 Members of Congress, we requested that full hearings be held to ensure that the many concerns which have been raised can be registered and addressed.

This second hearing proves the committee has seen the need for caution in acting on this extraordinary and significant document. This treaty as proposed represents a dangerous and unwarranted departure by the United States from a proud tradition of respect and adherence to international law and treaty, to a policy dictated by political accommodations.

Further, it is also bad policy to have extradition agreements made on a country-by-country basis. Therefore, I believe it would be in our Nation's best interests for this committee to suspend deliberations on this treaty. If there is a need to make changes in existing extradition agreements between the United States and other nations, do it through legislation considered by both Houses.

However, I stress that there is absolutely no need to modify the existing United States-United Kingdom Extradition Treaty. This proposed treaty, under the guise of combating terrorism, would virtually eliminate the political offense exception common to nearly 90 different treaties of extradition that the United States has in effect with other nations. The political crimes exception has been a cornerstone of Anglo-American extradition law and treaty for more than a century.

A second troubling aspect is the fact that upon ratification this treaty would be retroactive. In practical effect, this means that Great Britain would be able to extradite certain individuals accused of crimes or attempted crimes in Northern Ireland. This would include even those individuals whose extradition was previously barred by U.S. courts because of the existing political offense exception. There are several such cases, as the committee well knows.

Consider this as well: Existing treaties provide that extradition shall be denied if prosecution would be barred by the statute of limitations of either the requesting or the requested state. This treaty is in direct conflict with that policy.

It says prosecution would be barred by the statute of limitations of the requesting state only. Great Britain has no statute of limitations with respect to the offenses listed in the treaty.

A gentleman by the name of Sam O'Reilly lives in upstate New York. He is 89 years of age. In 1916 he fought against the British in the so-called Easter Rebellion. If this treaty was passed, Great Britain could extradite Sam O'Reilly to face charges related to his activities almost 70 years ago.

I might add, Mr. Chairman, if this treaty was in effect 100 years ago, Eamon de Valera would be subject to it. Make no mistake about it, the ratification of this treaty would be wrong from a legal, moral, and political standpoint. We have touched on some of the legal issues.

Ratification would place the United States in the position of accepting the political status quo in Northern Ireland. This would be morally indefensible and politically naive. Everyone knows the problems of Northern Ireland.

Mrs. Thatcher in her address before the joint session of Congress recognized there were problems, and she said there should be a political solution arrived at, a political solution. By the simple acknowledgment of the problem and that there would be an effort to seek a solution, she has stated clearly that there is a problem and that the status quo is not to be maintained.

At your August 1 hearing, State Department Legal Adviser and former Judge Abraham D. Sofaer stated that the political offense exception has no place in extradition treaties between stable democracies. He added the caveat that these democracies should have a political system that is able to address legitimate grievances and

a judicial process that provides fair treatment, and that is the heart of the issue.

Yes, we are talking about a stable democracy, but does the country requesting extradition have the ability to provide fair and just treatment? The State Department seems to think so, despite the travesty which passes itself off as a criminal justice system in British-run Northern Ireland.

The Special Powers Act adopted and readopted by the British Government for Northern Ireland has left the six counties there under a state of emergency for most of the last decade. It features such elements as detention without charge for up to 7 days and trials without juries and so-called Diplock courts. These courts have a conviction rate of over 90 percent, aided in some measure by uncorroborated evidence from paid informers being accepted in court.

Mr. Chairman, if this was the condition in America there would be a rebellion in our country. These are totally unacceptable situations and nobody in America would agree to it or countenance this kind of system for one moment. So, clearly there is not a valid, fair justice system in Northern Ireland.

This treaty comes on the heels of several recent court decisions which have clearly upheld the political exception provision in the existing United States-United Kingdom treaty. The British Government, upset by these rulings, seeks to overturn these decisions by amending the 10-year-old extradition treaty, a treaty that served them well and shall serve other countries well.

So far, they have convinced the State Department to go along. Yet, a distinguished professor of law, Francis A. Boyle, of the Illinois College of Law, charged in a recent letter that this supplementary extradition treaty would constitute "the functional equivalent of a bill of attainder that is specifically prohibited by article 9, section 9, clause 3 of the Constitution."

His point is based on the following scenario that could occur if this treaty was ratified. The British Government would seek the extradition of someone, such as Joe Doherty, who a court recently ruled could not be extradited because he successfully raised the political offense rule. Boyle argues that this effort to extradite Joe Doherty, based on the supplementary treaty, could be subject to a future constitutional challenge.

Mr. Chairman, democracies are sustained by their respect for and adherence to the rule of law. They are undermined when they selectively propose alterations to those laws. Such is the case with this treaty.

The Senate, indeed the American public, must be extremely wary about the motives of the British Government. We must not become a party to any advancement or legitimization of their policies in Northern Ireland which are anathema to most democratic principles.

I hope this committee will consent, not to this treaty, but to suspend further deliberations of it. Again, I state if there is a need for changes in extradition agreements between the United States and other nations, then let the changes be made in legislation by both Houses. I also reiterate that there is no reason to change the existing United States-United Kingdom Extradition Treaty, especially if

it is replaced by one which makes us a party to endorsing the repression and tyranny that has become the British system of justice in Northern Ireland.

Mr. Chairman, I heard your comments with relation to the administration's response to questions after the first hearing. I would suggest that after the witnesses testify today that the same process be continued. Have the administration respond to the comments made today.

I cannot be too emphatic about my feelings on this situation. It is outrageous. The attempts on the part of the State Department and the United Kingdom are outrageous. The abuses that are potential here boggle one's mind. We cannot engage in selective morality and selective treaties. It would be a precedent that would be extremely dangerous. The application of a treaty as proposed would be in violation of all things fair and just in our country.

I would prefer that this committee not give any further consideration to the treaty, but in the event that the committee does proceed that there be some corrective amendments that would eliminate the possibility of the abuses that are suggested by the committee and the potential abuses.

I stated before quickly, Eamon de Valera, if this treaty was in existence, Eamon de Valera, a revered, respected, internationally respected and revered head of the Republic, would have been subject to this treaty and extradited and be punished under a system that is alien to the American way of life.

Thank you, Mr. Chairman.

[The prepared statement of Representative Biaggi follows.]

PREPARED STATEMENT OF REPRESENTATIVE BIAGGI

Mr. Chairman: I wish to thank you and the members of this Committee for the opportunity to testify on the proposed Supplementary Extradition Treaty between the United States, the United Kingdom and Northern Ireland. In a letter I sent to Chairman Lugar, co-signed by 56 Members of Congress, we requested that full hearings be held, to ensure that the many concerns which have been raised can be registered and addressed. This second hearing proves the Committee has seen the need for caution in acting on this extraordinary and significant document.

This treaty, as proposed, represents a dangerous and unwarranted departure by the United States from a proud tradition of respect and adherence to international law and treaty, to a policy dictated by political accommodation. Further, it is also bad policy to have extradition agreements made on a country by country basis. Therefore, I believe it would be in our nation's best interest for this Committee to suspend further deliberations on this treaty. If there is a need to make changes in existing extradition agreements between the United States and other nations, do it through legislation considered by both Houses. However, I stress that there is absolutely no need to modify the existing U.S.-United Kingdom Extradition Treaty.

This proposed treaty, under the guise of combatting terrorism, would virtually eliminate "political offense" exception common to nearly 90 different treaties of extradition that the U.S. has in effect with other nations. The political crimes exception has been a cornerstone of Anglo-American extradition law and treaty for more than a century.

A second troubling aspect is the fact that upon ratification, this treaty would be retroactive. In practical effect, this means that Great Britain would be able to extradite certain individuals accused of crime or attempted crimes in Northern Ireland. This would include even those individuals whose extradition was previously barred by U.S. courts because of the existing political offense exemption. There are several such cases, as the Committee well knows.

Consider this as well. Existing treaties provide that extradition shall be denied if prosecution would be barred by the statute of limitations of either the requesting or the requested state. This treaty is in direct conflict with that policy. It says prosecu-

tion would be barred by the statute of limitations of the requesting state only. Great Britain has no statute of limitations with respect to the offenses listed in the treaty.

A gentleman by the name of Sam O'Reilly lives in upstate New York. He is 89 years of age. In 1916 he fought against the British in the so-called Easter Rebellion. If this treaty were passed, Great Britain could extradite Sam O'Reilly to face charges related to his activities almost 70 years ago.

Make no mistake about it. Ratification of this treaty would be wrong from a legal, moral and political standpoint. We have touched on some legal issues. Ratification would place the U.S. in the position of accepting the political status quo in Northern Ireland. This would be morally indefensible and politically naive.

At your August 1 hearing, State Department Legal Advisor and former Judge Abraham D. Sofaer stated that the political offense exception has no place in extradition treaties between stable democracies. He added the caveat that these democracies should have a political system that is able to redress legitimate grievances and a judicial process that provides fair treatment. That is the heart of the issue. Does the country requesting extradition have the ability to provide fair and just treatment? The State Department seems to think so, despite the travesty which passes itself off as a criminal justice system in British-run Northern Ireland.

The Special Powers Act adopted and readopted by the British government for Northern Ireland has left the six counties there under a state of emergency for most of the past decade. It features such elements as detention without charge for up to seven days, and trials without juries in so-called diplock courts. These courts have a conviction rate of over 90 percent, aided in some measure by uncorroborated evidence from paid informers being accepted in court.

This treaty comes on the heels of several recent court decisions which have clearly upheld the political exception provision in the existing U.S. - U.K. treaty. The British government, upset by these rulings, seeks to overturn these decisions by amending the 10 year old extradition treaty. So far, they have convinced the State Department to go along.

Yet, a distinguished Professor of Law, Francis A. Boyle, of the Illinois College of Law, charged in a recent letter that this Supplementary Extradition Treaty would constitute "the functional equivalent of a bill of attainder that is specifically prohibited by Article 9, Section 9, Clause 3 of the Constitution." His point is based on the following scenario that would occur if this treaty were ratified. The British government would seek the extradition of someone such as Joe Doherty, who a court recently ruled could not be extradited because he successfully raised the political offense rule. Boyle argues that this effort to extradite Joe Doherty, based on the Supplementary Treaty, could be subject to a future constitutional challenge.

Mr. Chairman, democracies are sustained by their respect for and adherence to the rule of law. They are undermined when they selectively propose alterations of those laws. Such is the case with this treaty. The Senate, indeed the American public, must be extremely wary of the motives of the British government. We must not become a party to any advancement or legitimization of their policies in Northern Ireland which are an anathema to most democratic principles.

I hope this Committee will consent, not to this treaty, but to suspend further deliberations on it. Again, I state if there is a need for changes in extradition agreements between the United States and other nations, then let the changes be made in legislation considered by both Houses. I also reiterate that there is no reason to change the existing U.S. - United Kingdom Extradition Treaty, especially if it is replaced by one which makes us a party to endorsing the repression and tyranny that has become the British system of "justice" in Northern Ireland.

BIAGGI TO SENATE PANEL: SCRAP NEW EXTRADITION TREATY

U.S. Rep. Mario Biaggi (D-NY) today called on the Senate Foreign Relations Committee to end further action on a controversial new extradition treaty between the United States and the United Kingdom, which he said is "legally, politically and morally flawed."

Biaggi made his comments in testimony before the Senate Foreign Relations Committee, which conducted its second hearing on the treaty. Biaggi serves as Chairman of the 112 member, bi-partisan Ad Hoc Congressional Committee for Irish Affairs.

"Recent federal court decisions have upheld the so-called 'political crime' exception to extradition for certain individuals accused of crimes in Northern Ireland," Biaggi said. "Great Britain, in a desperate attempt to overturn these decisions, is pushing hard for final approval of this treaty, which would virtually eliminate the political crime exception—a cornerstone of Anglo-American extradition law for

more than a century and a part of extradition agreements which the U.S. has entered into with some 90 other nations."

Biaggi said the Supplementary Treaty was signed by the two governments in late June, but cannot take effect unless ratified by a two-thirds vote of the Senate, following action by the Foreign Relations Committee. "The treaty establishes several other legal precedents that are troubling," he stated. "Upon ratification, the treaty would be retroactive. It would also change the existing treaty's provision that prosecution can be barred by the statute of limitations of either the U.S. or the United Kingdom. The new treaty would only bar prosecution based on the laws of Great Britain, which has no statute of limitations for any of the offenses eligible for prosecution."

Biaggi, in his testimony, presented the case of an 89-year-old man living in New York who fought against the British in the so-called Easter Rebellion of 1916. "Under this treaty with its retroactivity and no statute of limitations, Britain could extradite this individual for activities that took place almost 70 years ago," he declared.

Biaggi charged that ratification of this treaty would put the United States in the position of accepting the "political status quo" in Northern Ireland. "This would be a most tragic development for we would be a party to the furtherance of the British government's repressive policies over Northern Ireland. A person extradited back to Northern Ireland to face charges enters a judicial system which features detention without charges and trials without juries. Their courts, known as Diplock courts, achieve conviction rates in excess of 90 percent and do so by allowing uncorroborated testimony by paid informants."

Biaggi concluded, "I vehemently oppose this effort to make radical changes in our extradition treaty with the United Kingdom, and believe the Administration is doing so as a political accommodation to the Thatcher government. Changes in treaties should not be done on a country by country basis. Changes in extradition laws should be done through legislation considered by both Houses in Congress. I contend there is no need for any changes in the existing extradition treaty between the U.S. and the U.K. and therefore urge the Committee to end their consideration of this supplementary treaty."

Senator TRIBLE. Thank you, Congressman Biaggi.

Senator Evans.

Senator EVANS. No questions.

Senator TRIBLE. Senator Kerry.

Senator KERRY. I do not have any questions. I have an opening statement I would like to submit at some point, Mr. Chairman.

But I would like to thank the Congressman for his caring and for his forcefulness on this issue, and I appreciate his taking the time to share his views with us. Thank you very much.

Mr. Chairman, I would just like to at this time say that I regret that the mayor of Boston, Mayor Flynn, who was going to be here to testify, has been unable to join us. I appreciate the Chair's efforts to try to accommodate his schedule previously.

I would like to make certain that his comments are submitted for the purposes of the record, and I would ask unanimous consent that we may do so, Mr. Chairman.

Senator TRIBLE. It will be so ordered.

Senator KERRY. For myself, I would just like to say that, as the Chair knows and as members of this committee know, earlier this year the Senate voted by a margin of 89 to 8 in favor of a resolution supporting a return to democracy in the Philippines. In that we sent what I thought was a fairly unequivocal message to President Marcos as to what would be the basis for our future relations. We sent a message defining what was important to us as a country and the kinds of principles and values upon which we base our relationships.

Among the particular actions we felt were important included the holding of free and fair elections, the establishment of the writ

of habeas corpus, the end to human rights abuses, and the end to capricious and arbitrary arrests and detention through the issuance of what are known as Presidential detention actions.

I believe that when it comes to issues like those, the Senate and the Congress have been clear and unequivocal about where they stand. And I think it is our responsibility, as Congressman Biaggi has stated here today, to make certain that we do that at every opportunity.

It seems to me that this treaty is one more example of that kind of opportunity. I believe that the supplementary extradition treaty presently before the committee is not consistent with those principles, as we have expressed them on countless different occasions.

Now, the government of Margaret Thatcher thinks it is of utmost importance for the American people to give up one of our most cherished legal doctrines, which dates back to 1793, when Secretary of State Thomas Jefferson refused to surrender Citizen Genet to the Government of France at that time.

It seems to me there is too much of our values, and too much of our history and tradition associated with our commitment to the political offense exception doctrine in our extradition law. And as the Congressman has cited, it is also a history which has been shared at times by both the United States and Great Britain, and it is etched deeply in the names of heroic democratic figures such as Louis Kossuth, the Hungarian revolutionary leader, the leader of the unsuccessful uprising against Austria in 1848; the Italian nationalists such as Giuseppe Mazzini or Giuseppe Garibaldi; Irish patriots such as the author, poet, and Boston newspaper editor John Boyle O'Reilly and former Prime Minister Eamon de Valera, as you stated, Congressman: the Cuban revolutionary Jose Marti; the father of the Mexican revolution, Francisco Madero; Filipino democrats such as Benigno Aquino, Jovito Salonga, Raul Manglapus, and Raul Daza; and Korean opposition leader Kim Dae Jung.

And so, Mr. Chairman, I think we owe too much to past, present, and the future democratic leaders and nationalists around the world to abandon this most fundamental of principles.

I simply call on my fellow members of this committee to call to mind as we look at this treaty what it actually does and not what it purports to do. The treatment of Irish Catholics in Northern Ireland and the denial of their rights and privileges is not just limited to citizens of Ulster.

I have a statement, from Massachusetts State Representative Marie Howe detailing the experiences that she and Marion McCarthy of Hull, MA, endured just this past August 12 while traveling in Northern Ireland.

They were detained for nearly 5½ hours by the Royal Ulster Constabulary and the British Army. And I ask that this statement be made a part of the record. Briefly, both of my constituents were detained after taking some film shots of the Maze Prison as they were driving by. I would like to briefly read one portion of this statement:

We were treated in an extremely threatening and intimidating manner throughout the detention period and were constantly harassed and insulted for our being of Irish descent, for our political affiliations in the United States, and our country's democratic system of rights and justice were continuously insulted and ridiculed.

When Marie Howe produced her legislative identification for the State of Massachusetts, she was informed: "We do not care who you are; you are in the United Kingdom now, and you have no rights here at all."

Mr. Chairman, this is one additional sad commentary on the sad condition in Northern Ireland, and that is one of the reasons I believe this treaty is nothing more than a wolf in sheep's clothing. Its purpose is not to fight terrorism. It is an assault upon our tradition. I just for the life of me cannot see why we should make this kind of special exception in this kind of circumstance.

I thank the committee chairman for the time and I thank the Congressman again for his testimony.

Senator TRIBLE. Thank you, Senator Kerry.

Senator Eagleton.

Senator EAGLETON. I have no opening statement, Mr. Chairman.

Senator TRIBLE. Congressman Biaggi, do you believe that violence is an appropriate means of bringing about political change in Northern Ireland?

Representative BIAGGI. The answer is I am against violence. I have clearly been against violence. But the violence in Northern Ireland is not unilateral. I have always been against violence as a matter of policy. I think that is the civilized attitude to adopt.

But the violence in Northern Ireland does not come from one source. The violence is initially imposed by the presence of the British in that area that have abused that privilege, and they have produced a violent response. Do I justify it? No. Do I agree with it? No, but I understand it.

Senator TRIBLE. Is it in your judgment, given the history of the situation there as you understand it, is violence an appropriate means of bringing about political change?

Representative BIAGGI. Forgive me. Will you please repeat that, Mr. Chairman.

Senator TRIBLE. Do you believe it is appropriate for those who wish to change the political system in Northern Ireland to engage in violence?

Representative BIAGGI. I think there is a better way. Clearly, we have advocated that time and time again. We have urged that there be a meeting of all the parties engaged in the conflict, to sit down and reason so that we can resolve the problem.

Mr. Chairman, if you will recall, at the outset of this latest effort, "the latest effort" meaning the last 10 or 12 years, the United Kingdom denied that, in fact, there was a problem. And yet, we in America and the Congress continued to make the case that there was.

The Ulster Constabulary was founded in violation of law. As a matter of fact, we in the United States have supplied the Ulster Constabulary with arms in violation of our law, and they were abusing—the Constabulary was found guilty of the violation of human rights by the Barrett Commission, as well as by the European Parliament.

They clearly were in violation. But what we found is a quantum leap from the outset of denial of allegations, denial of these inhuman conditions, to an acknowledgment by Mrs. Thatcher. As I stated before, she acknowledged in a statement before the joint

Congress, joint session of Congress, that there was a problem and it must be addressed, it must be resolved politically.

And I agree with that. I agree with that. We had a comparable situation in America with the civil rights revolution. Rev. Martin Luther King always advocated peaceful means, but he had adherents who practiced violence. He never encouraged violence, but there are people out there who become emotional and find they are impatient.

But the major thrust was made by people who believe in peaceful means, and there should be some response. Heretofore there has been no response. Hopefully, Mrs. Thatcher will pursue her thoughts expressed in her address in the Congress and help resolve it. I understand there are some discussions going on.

Senator TRIBLE. It seems to me that acts of violence on both sides ought to be condemned by all Americans. If indeed that is the case, we have to answer the question whether, if the United States continues to permit those suspected of committing violent acts in Northern Ireland to escape extradition, it can be fairly said that the U.S. Government, the U.S. policy, condones those acts. That is a result certainly that we would want to avoid.

Let me just make one other observation, and I know you have to return to your duties on the House side. You raised the question of the fundamental fairness of the Diplock courts, and that is something I assure you that we will be looking at in great detail today. We will hear from a number of legal scholars.

But I would observe simply for the record that the acquittal rates in Diplock courts are the same as in non-Diplock courts. The acquittal rates between Protestants and Catholics is roughly the same. And the Republic of Ireland in terrorist cases does not provide jury trials, but rather has deemed it appropriate, given the nature of that offense, to provide for nonjury trials.

Indeed, you have invoked the name of a great patriot of Ireland, and it is the policy of the Republic of Ireland to follow, at least in broad brush, the policy of the supplemental treaty. Yet, the Republic of Ireland has extradited people back to Northern Ireland who have been accused of committing violent offenses.

Once again, I guess all that goes to prove, this is not a black and white situation, but one which we must look at very closely, and we will do so.

And we thank you for your testimony here today.

Representative BIAGGI. If I may, Mr. Chairman, on the question of political refugees, the determination is made by our Government when people come here. There have been questions of whether or not a man is a political refugee decided by the Department of State and also later on by the courts of our land.

When the courts decide that he is, in fact, a political refugee refugee, then he is permitted to stay here. If they decide otherwise, he is extradited.

But on the other side of it, the fact that the Republic admits the same offense that the United Kingdom does does not make it right. Two wrongs never made a right. We are talking about criminal justice systems. If the United States is to intervene in this case, then I would suggest the United States intervene in a positive fashion, in a more vigorous and positive fashion with relation to seeking and

assisting in obtaining a resolution to the problem, with a solution that is long since overdue.

Senator TRIBLE. Thank you, Congressman Biaggi.

Senator Eagleton.

Senator EAGLETON. Mr. Chairman, I have a few questions of the Congressman, if I may.

Congressman, one of the witnesses who will testify later is Professor Pyle. His testimony says this. This is with respect to the Diplock trials: "Only one conclusion can be drawn. The risks of injustice are too great to allow the extradition of alleged members of the PIRA to Northern Ireland at this time."

Do you agree with that conclusion by the professor?

Representative BIAGGI. Yes; I do. I do. The extraditing, it is very plain, it is like permitting a defector to go back to the Soviet Union. You know that individual is going to be treated poorly. He is harassed and relegated to some dark area in Siberia. The fact of the matter is he is going back to deal with a court system that would be unacceptable in America.

Another aspect. They talk in terms of informers. Uncorroborated evidence of an informer, paid informer in that area, is sufficient to convict the person.

Senator EAGLETON. Let me pursue that with you if I may. Suppose Prime Minister Thatcher goes to Northern Ireland, which is part of the territory which she and her government govern, and she does go from time to time, under tight security. And she usually visits a military installation.

Suppose she goes to a barracks and the PIRA, which has enhanced intelligence activities, as was shown in the Brighton bombing, wires the barracks and she is blown up, along with a charwoman, and killed and the culprits flee to the United States. Should they or should they not be extradited to Northern Ireland?

Representative BIAGGI. That is an extraordinary illustration.

Senator EAGLETON. Well, Brighton was extraordinary.

Representative BIAGGI. I agree.

If I were in a position to say, I would certainly permit extradition in that case.

Senator EAGLETON. You would permit extradition?

Representative BIAGGI. Yes; I would, that is my personal opinion. What the treaty says should prevail.

Senator EAGLETON. Knowing that the culprits, alleged culprits, would be tried in a Diplock court?

Representative BIAGGI. Yes; if that be the case.

Senator EAGLETON. Now, suppose it is Prince Charles. Would that be the same answer?

Representative BIAGGI. I understand the point the Senator is trying to make. But my understanding of it is whether or not the individuals in question were involved and fled here to seek asylum from oppression and harassment—clearly that would not be the case. They come to America in order to avoid charges of murder, and I do not think anyone would agree that they have a right to be given the privilege of the current exception under the existing treaty.

Senator EAGLETON. The same would apply to the Secretary of State for Northern Ireland as part of Mrs. Thatcher's Cabinet? You would extradite?

Representative BIAGGI. Absolutely.

Senator EAGLETON. What about a charwoman by herself? She is not a member of the Cabinet, she is not a prince. She is not the Prime Minister. She is a charwoman who comes in and cleans in the barracks.

Representative BIAGGI. I understand, I understand the point the Senator is making. I knew you were coming down to that direction.

The fact is, if it is murder, if it is murder they should be extradited, unless the political offense exemption is accepted. The Senator knows full well I have spent 23 years as a law enforcement officer.

Senator EAGLETON. If it is murder, extradite.

Representative BIAGGI. Absolutely, unless it falls under the political offense exemption.

Senator EAGLETON. Does it make any difference how the murder is perpetrated? That is, is it different if it is a bomb versus a rifle versus a handgun versus a dagger?

Representative BIAGGI. No; murder is murder.

Senator EAGLETON. Murder is murder.

Representative BIAGGI. Absolutely.

Senator EAGLETON. If the charge is murder, extradite. Now, what if culprits are charged in the Brighton bombing? Now, we are moving out of Northern Ireland. We are moving to England as part of the United Kingdom, and they are charged with felonious wounding.

I am trying to think. Was anyone killed in the Brighton bombing? One man was paralyzed from the waist down for life. Let us go with that one—felonious wounding and permanent debilitating injury. People are charged with that and they flee to the United States.

Now, we have no Diplock situation here because this is England. Would you extradite on that?

Representative BIAGGI. Senator, I have always, for those responsible—those responsible for that type of crime should be arrested and prosecuted to the full extent of the law. My only concern is that Diplock system, because you might talk in terms of prosecuting under the law. I am thinking in terms of the American system where the individual has an opportunity to get the full thrust and benefit of the system.

I am not so sure that they would be afforded that under the Diplock system.

Senator EAGLETON. But you would extradite for murder, you have made that clear, to Northern Ireland, even under the Diplock system, for murder?

Representative BIAGGI. Yes; I would, my personal opinion.

Senator EAGLETON. Now, suppose there is a second Sunnydale and suppose after that comes a joint government in which both Protestants and Catholics participate in the government, as did occur briefly back in the seventies. Suppose, for example, John Hume is part of the government, as he was back in the seventies.

And suppose the Prime Minister of the Republic of Ireland says: Ah, at long last the matter is resolved and the civil war is over. And suppose the joint government proceeds to function. And then the PIRA throws a bomb somewhere in the North. Are they entitled then to the political exception if they flee to the United States? Is the civil war over?

Representative BIAGGI. That is a hypothetical——

Senator EAGLETON. That existed for a period of time.

Representative BIAGGI. I understand.

Senator EAGLETON. It might exist. Hopefully, it might exist again.

Representative BIAGGI. What would be the consequences of that bomb throwing?

Senator EAGLETON. Let us say no one is wounded, just heavy damage to property.

Representative BIAGGI. I am not so sure how I would respond to that.

Senator EAGLETON. Does the bomber determine when the civil war is over? Does the guy put on a button that says "PIRA bomber, active in civil war"? As long as he wears that button is the war on?

Representative BIAGGI. If I may respond by asking a question. Would he under the current treaty? He would not be extradited, so why should we change it? Under the current treaty, murder would be extradition; he could be extradited.

Senator EAGLETON. Under the current treaty?

Representative BIAGGI. Yes.

Senator EAGLETON. But you do not like the treaty that is before us and you do not like Diplock trials, but you do make exception for murder?

Representative BIAGGI. Yes.

Senator EAGLETON. You know, this is a reciprocal treaty. Suppose Mr. Farrakahn, in one of his more grotesque speeches, says he is going to declare a second Civil War in America, and he says: The first Civil War was fought over blacks' rights; I, Farrakahn, declare a second Civil War; I think blacks are still deprived in America, and they are a minority that is abused and picked upon.

And one of Farrakahn's guys goes to New York and assassinates Mayor Koch, a Jew in Queens, and flees to Britain. Should Britain return him, this assailant, to be tried in Queens, this black?

Representative BIAGGI. Under the present treaty he would be extraditable.

Senator EAGLETON. But the magistrate in Britain says: Ah, I have called Professor Pyle in America and some other professors, and this black would probably be tried by an all-white jury in Queens; that would not be fair.

So the magistrate in Britain says: That is reverse Diplock; I refuse to extradite. How would that play in your mind, if that were the case?

Representative BIAGGI. Not well at all.

Senator EAGLETON. Do you think a black Farrakahn follower could get a fair trial in front of an all-white jury for the murder of a Jewish Mayor of New York?

Representative BIAGGI. I understand what the Senator is saying. Yes; I believe so, absolutely. What the Senator is implying by that

is that all whites are prejudiced against blacks, and I do not believe that. I do not think all blacks are prejudiced against whites.

Senator EAGLETON. I am an ex-prosecutor. There are things called peremptory challenges where both the prosecution and the defense can strike witnesses—strike prospective jurors without cause. You do not have to state the cause, just strike him. I have known of many cases wherein that has been used to strike people of a certain race or ethnic attachment, just to get them off the jury.

Could a magistrate in Britain say, well, we do not like that system and we just will not extradite because that is being used in trials in America?

Representative BIAGGI. Of course he can say that, but that does not make it right. The fact of the matter is—

Senator EAGLETON. You see, what I am getting at. We are going to let all of this stuff—even under the present treaty—be decided by a magistrate, not the highest judicial official in America. It is not Warren Burger; it is not the Court of Appeals; in some instances, it is not the district court.

It is a magistrate who decides what he thinks is sort of best, and then could decide. Well, I do not like Diplock trials. To me they are inherently unfair. I will not send back the killer of Margaret Thatcher. I will not send back the killer of a charwoman. That one has already taken place. The charwoman case is an actual case, not a theoretical case.

So it is up to a magistrate in Terre Haute, IN, in Springfield, MO, wherever may be the venue, to decide what he or she thinks is best about sending this person back. That is not a very satisfactory status for the law and is not a very satisfactory status for international diplomacy, do you think?

Representative BIAGGI. Well, what the Senator is saying is that the system may not be a perfect system, and if that be the case then we should change the system. But if we are to change the system, then it should be done through the legislative process, through both Houses that will deal with it, not through a treaty, not through the method in which you are trying to do it here.

Senator EAGLETON. I would agree with you on that. I think the preferable route would be to go the legislative route and to ventilate some of these things through the legislative process.

So I agree with you to that extent, and I am gratified to hear that in all instances you would extradite for murder. Would you extradite for crimes of odious barbarity? [Laughter.]

Representative BIAGGI. I wonder what that means.

Senator EAGLETON. Let me go through these. Special cruelty?

Representative BIAGGI. I still do not know what that means.

Senator EAGLETON. Wanton crimes?

Representative BIAGGI. I do not know what that means, either?

Senator EAGLETON. I do not know what they mean, either. Professor Pyle in his testimony knows what they mean. He says that people can be extradited for that. This little old magistrate in Terre Haute can declare a crime to be of odious barbarity. I do not have that must trust in that magistrate in Terre Haute.

Representative BIAGGI. I would suggest we change the system, but if we are to do that let us do that let us do that through the legislative process.

Senator EAGLETON. How about a bomb, the placing of a bomb in a church, and the bomb does not go off, luckily, but they can identify the person who placed it?

Representative BIAGGI. Are we talking about something that has a political aspect to it?

Senator EAGLETON. Oh, yes; this is a PIRA guy wearing his button.

Representative BIAGGI. All these have political aspects to it?

Senator EAGLETON. Yes; it is a Protestant Church, Paisley's church.

Representative BIAGGI. Well, now you may put a different complexion on it. [Laughter.]

In humor, clearly that was not humor.

These are judgments that can be made here in America. They have worked satisfactorily over the years in 90 different treaties. Forgive me for repeating it, but if you find the system is not adequate then let us amend the system, but not through this method.

Senator EAGLETON. All right. The bomb goes off, no one is killed, but some children are injured, seriously injured.

Representative BIAGGI. I think it still applies. If a person seeks refuge in the United States, a person seeks refuge in the United States using the political asylum exception as the basis for that right to stay here, then that will obviously be brought into question and it will be resolved through our method.

I have greater faith in our courts than I do in the Diplock court system.

Senator EAGLETON. So you would not extradite in that case?

Representative BIAGGI. Not unless the court made a determination. It is not for me to make a determination.

Senator EAGLETON. If the victim is killed you would, because that is back to your murder doctrine.

Representative BIAGGI. I might support that, but in the end it is the system that would have to make the determination.

Senator EAGLETON. If a magistrate ruled that the placing of a bomb in a church wherein children were injured was a crime of odious barbarity and extradited, would you be satisfied with his judgment on that?

Representative BIAGGI. We are coming back to "odious barbarity."

Senator EAGLETON. He said that in his opinion. He said, blowing up a church wherein children are injured is in my opinion as magistrate a crime of odious barbarity and therefore I extradite, I waive the political exception.

Representative BIAGGI. I would, in the light of where we are, I would certainly cite the existing treaty, refer to that and let the process take its course.

Senator EAGLETON. So murder is the only thing that you across the board would extradite?

Representative BIAGGI. I as an individual. But in the end, all of us would have to depend upon the existing treaty. I think murder

is offensive, as I do many other things are offensive. That is my personal outrage speaking.

But as far as the application of the law is concerned, we are talking about everything is based on the existing treaty and we must go through the full process, whether it be murder, whether it be injuries, or whatever it is. Odious barbarity, whatever it is, would have to go through the process.

The question is, do we want to change the process? Are we dissatisfied with the process? Then let us change it, but do it through the legislative method and not just for one country, because you might find the same argument applying to other countries.

Senator EAGLETON. Thank you, Mr. Congressman.

Thank you, Mr. Chairman.

Senator TRIBLE. Mario, in the illustration portrayed by Senator Eagleton of the charwoman and the Prime Minister, would you extradite in the cases where they were maimed?

Representative BIAGGI. Let me pose the question, would they be extraditable under the existing treaty? If they would be, then fine. If they cannot, then they cannot be. Are you asking my personal opinion? That is another matter. But we are talking now about the law as it exists today.

Senator TRIBLE. I am asking for your personal opinion.

Representative BIAGGI. I have a particular affection for charwomen. My mother was one. But aside from that, I think those crimes are outrageous. I am highly offended by them. I have made statements about every such occasion on the House floor, especially, I recall, when Lord Mountbatten was assassinated I spoke out vigorously on that.

We have a treaty in existence. Let us deal with it.

Senator TRIBLE. In your own opinion, the present treaty and the supplemental treaty aside, given the factual situation sketched by my colleague from Missouri, you have said without reservation and without exception that you would extradite in the case of murder?

Representative BIAGGI. Yes; I would.

Senator TRIBLE. What if they were only maimed, not murdered?

Representative BIAGGI. That is a considerably lesser crime. In our own criminal court system, you have different gradations. You talk about murder, you talk about manslaughter, and right down the line. So it is considerably less.

Again, the question is was it in fact politically motivated? Can you justify the person's being granted refuge here because that is in fact a political crime?

Senator TRIBLE. In the illustration by the Senator we are talking about a crime that could be characterized as political in that it was carried out by someone wearing the PIRA button.

Representative BIAGGI. I do not think that is sufficient to indicate a crime is committed because of political motivations, because we are wearing a button. Many of us wear different types of buttons, and someone else commits a crime.

Senator TRIBLE. I do not want to be argumentative, old friend. That is not my purpose.

Representative BIAGGI. I know.

Senator TRIBLE. But I am simply tracking the supplemental treaty. The next offense enumerated here is malicious wounding or

maiming. I wonder if you are prepared to say yes or no or you are not sure in that case?

Representative BIAGGI. No; I would go for murder, but I would not necessarily go for the others.

Senator TRIBLE. So only murder would be extraditable in your opinion?

Representative BIAGGI. I think it is a capital crime.

Senator TRIBLE. Not maiming or not manslaughter or kidnapping?

Representative BIAGGI. Each of those would have to be determined by—

Senator TRIBLE. Letter bombing or those kinds of things would not fall within the Biaggi exception? [Laughter.]

Representative BIAGGI. I like the way you characterize that, Mr. Chairman.

Each of those would be subject to the process which would be initiated by the existing treaty.

Senator TRIBLE. All right, sir; you have been very patient and very forthcoming with the committee, and I thank you very much for being here today.

Representative BIAGGI. Thank you, Mr. Chairman, gentlemen.

Senator TRIBLE. Senator DeConcini, our distinguished colleague from Arizona.

Senator DeConcini, your statement will be made part of the record. You may summarize your statement if you like.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM ARIZONA

Senator DeCONCINI. Thank you, Mr. Chairman. My statement will be forthcoming. My full statement is in the typewriter.

I am pleased to be here. I am pleased indeed at the length of questioning.

Senator EAGLETON. Senator, would you pull in the mike, please.

Senator DeCONCINI. Yes.

I am interested indeed in the length of questioning on the technical aspects of it by my colleagues on this Committee.

I am pleased to have an opportunity to testify for the supplemental extradition treaty between the United States and the United Kingdom. I will make a rather brief statement here and have an extensive one a little bit later for the record.

I have been interested in the problem of Northern Ireland for many years. This summer I had the great pleasure of visiting Northern Ireland and speaking with numerous people—Protestants, Catholics, British leaders, et cetera. I do not claim to be any expert because of that brief stay there, but it certainly left a great impression with me.

Mr. Chairman, although the official topic of this hearing is a supplemental extradition treaty with Great Britain, the broader question of Northern Ireland cannot and should not be ignored. In fact, if anything useful is accomplished by the treaty before us today, it is that it provides a means for drawing the Senate's attention to the struggle of the people of Northern Ireland and the unfortunate

role that one of our nation's closest allies has become locked into in that struggle.

The conflict among the people of Northern Ireland, which was originally provoked by religious differences, has been perpetuated and exaggerated by the so-called system of justice in Northern Ireland, imposed by the Civil Authorities Act of 1922.

This Act, with amendments, was consolidated into the Emergency Provisions Act of 1978. The Prevention of Terrorism Act of 1984, along with the Emergency Provisions Act, govern all offenses arising out of the conflict in Northern Ireland.

This legislation pure and simply violates the human rights of the people of Northern Ireland, whether they be Protestant or Catholic. The Emergency Provision Act contains wide powers of arrest for the police and the army. It contains the power to stop and search without having to arrest. It shifts the burden of proof from the Crown to the accused in cases involving possession of firearms, ammunition, or explosives.

Perhaps the aspect of Northern Ireland's justice system that is most frightening to those of us who value the right of citizen's participation in our own nation's system of justice is the Diplock court system of Northern Ireland. There is no right to a jury for those accused of political acts of violence in Northern Ireland. Judges act alone, shutting out the right of an individual to be judged by his peers.

Mr. Chairman, it is my view that the treaty before us is flawed in and of itself. Moreover, it is my view that the United States should not negotiate a new extradition treaty with Great Britain unless and until the system of injustice in Northern Ireland and the other facets of British rule in that country are satisfactorily addressed and resolved.

The Administration tells us that this treaty was negotiated in order to improve law enforcement cooperation and counter international terrorism and other crimes of violence. There is no doubt that we all abhor terrorism, but we must carefully scrutinize what kind of response we make in the cause of preventing terrorism, especially when the traditional role of our country as a place of asylum for political dissidents is affected.

Regrettably, all too often in our country the attention that is given to national or international tragedies gives rise to political solutions that cause more trouble than they actually solve. With this fact in mind, we must ensure that the treaties we enter into to combat international terrorism do not become a pretext for political actions or maneuvers with which we disagree.

Frankly, I am not convinced that we need a supplemental to the extradition treaty which we already have with Great Britain. What is the evidence that the existing treaty has not worked?

It is my understanding that, out of the 56 closed cases involving requests by Britain for extradition, in only two has extradition been denied. Having been on the Senate Judiciary Committee for almost 9 years and having been the Chairman of the Subcommittee on Judicial Machinery for 4 of those years, I have considerable faith in both the judges in this country and in our system of checks and balances which allows the American judicial system to play a

real role in matters of this sort and not merely be a rubber stamp for Administration foreign policy decisions.

I realize that our decision has flaws in it and magistrates make mistakes, but I would not trade it, nor would anyone else here, for any other system. I must add that I trust the decisions of American judges a great deal more than those made by Diplock court judges.

Furthermore, the Foreign Relations Committee and the Judiciary Committee have considered amendments to extradition law at least three times in the last two Congresses. Both Committees agreed that the courts should be allowed to determine the sufficiency of the political offense claims. Yet, as you well know, the treaty before us today explicitly defines which offenses the court cannot find to be political.

This list is so sweeping that essentially nothing will be left for the courts to decide. The cases then go to the Secretary of State, giving the Executive Branch alone the power to decide whether to extradite or not.

Our extradition treaties with other countries do not have such provisions, although Senate ratification of this treaty could create a precedent for others that might follow.

The ongoing struggle in Northern Ireland will not be solved by a new extradition treaty, but by new political solutions. Before we consider making this major change in our extradition law, it is my view that major changes should be at least begun in all facets of life in Northern Ireland, perhaps beginning with the court system, but extending rapidly through the economic, political, and social structures of that nation.

If such changes were seriously undertaken by the British and if a timetable were set and followed for implementing those changes, then I firmly believe that the British would no longer call upon us to change our extradition laws.

Thank you, Mr. Chairman. And also, thank you for the generosity of scheduling the time so that I could attend the Rules Committee for a few minutes and hear Congressman Biaggi before me.

[The prepared statement of Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman and members of the committee, I am honored to be here today to testify on the Supplementary Extradition Treaty between the United States and the United Kingdom. I will make a rather brief statement, but will submit more extensive remarks for the hearing record.

I have been interested in the problems of Northern Ireland for many years and this summer I had the great pleasure of visiting Northern Ireland and speaking with numerous individuals on all sides of the conflict there.

Mr. Chairman, although the official topic of this hearing the Supplementary Extradition Treaty with Great Britain, the broader question of the situation in Northern Ireland cannot and should not be ignored. In fact, if anything useful is accomplished by the Treaty before us today, it is that it provides a means for drawing the Senate's attention to the struggle of the people of Northern Ireland and the unfortunate role that one of our nation's closest allies has become locked into in that struggle. Conflicts among the people in Northern Ireland which were originally provoked by religious differences have been perpetuated and exaggerated by the so-called system of justice in Northern Ireland imposed by the Civil Authorities Act of 1922. This Act, with amendments, was consolidated into the Emergency Provision Act of 1978. The Prevention of Terrorism Act of 1984 along with the Emergency Provision Act govern all offenses arising out of the conflict in Northern Ireland.

This legislation, pure and simply, violates the human rights of the people of Northern Ireland. The Emergency Provision Act contains wide powers of arrest for

the police and the army. It contains the power to stop and search without having to arrest. It shifts the burden of proof from the Crown to the accused in cases involving possession of firearms, ammunition or explosives.

Perhaps the aspect of Northern Ireland's judicial system that is most frightening to those of us who value the right of citizen participation in our own nation's system of justice is the Diplock Court system in Northern Ireland. There is no right to a jury for those accused of political acts of violence in Northern Ireland. Judges act alone, shutting out the right of an individual to be judged by his peers.

Mr. Chairman, it is my view that the treaty before us is flawed in and of itself. Moreover, it is my view that the United States should not negotiate a new extradition treaty with Great Britain unless and until the system of injustice in Northern Ireland and other facets of British rule in that country are satisfactorily addressed and resolved.

The Administration tells us that this treaty was negotiated in order to improve law enforcement cooperation and counter international terrorism and other crimes of violence. There is no doubt that we all abhor terrorism, but we must carefully scrutinize what kind of response we make in the cause of preventing terrorism, especially when the traditional role of our country as a place of asylum for political dissidents is affected. Regrettably, all too often in our country the attention that is given to national or international tragedies gives rise to political solutions that cause more trouble than they solve. With this fact in mind, we must ensure that treaties we enter into to combat international terrorism do not become a pretext for political actions or maneuvers with which we disagree.

Frankly, I am not convinced that we need a supplement to the extradition treaty which we already have with Great Britain. What is the evidence that the existing treaty has not worked? It is my understanding that out of the 56 closed cases involving requests by Britain for extradition, in only two has extradition been denied. Having been on the Senate Judiciary Committee for almost nine years and having been the chairman of the subcommittee on Judicial Machinery for four years, I have considerable faith in both the judges in this country and in our system of checks and balances which allows the American judicial system to play a real role in matters of this sort and not merely be the rubber stamp for Administration foreign policy decisions. I must add that I trust the decisions of American judges a great deal more than those made by Diplock court judges.

Furthermore, the Foreign Relations Committee and the Judiciary Committee have considered amendments to extradition law at least three times in the last two Congresses. Both Committees agreed that the courts should be allowed to determine the sufficiency of the political defense claim. Yet as you well know, the treaty before you today explicitly defines which offenses the court cannot find to be political. This list is so sweeping that essentially nothing will be left for the courts to decide. The cases then go to the Secretary of State, giving the executive branch alone the power to decide whether to extradite or not. Our extradition treaties with other countries do not have such provisions, although Senate ratification of this treaty would create a precedent for others.

The ongoing struggle in Northern Ireland will not be solved by a new extradition treaty but by new political solutions. Before we consider making this major change in our extradition law, it is my view that major changes should at least be begun in all facets of life in Northern Ireland, perhaps beginning with the court system but extending rapidly through the economic, political and social structures of that nation. If such changes were seriously undertaken by the British, and if a time table were set and followed for implementing these changes, then I firmly believe that the British would no longer call upon us to change our extradition laws.

Senator TRIBLE. Senator DeConcini, we thank you for your statement.

Senator EVANS.

Senator EVANS. No questions.

Senator TRIBLE. Senator Cranston.

Senator CRANSTON. No questions.

Senator TRIBLE. Senator Eagleton.

Senator EAGLETON. Senator DeConcini, you place considerable emphasis in your testimony on the court system of Northern Ireland, and the court system of Northern Ireland stinks.

Now, having said that, let me pose this to you. The Republic of Ireland in 1982, I think, returned one Dominick McGlinchey to the

North. McGlinchey was very high up in the PIRA. If you and your wife were residents of Northern Ireland, would you encourage your wife to serve on a jury that is trying Dominick McGlinchey in Northern Ireland for murder?

Senator DECONCINI. Well, first of all, it would not be my prerogative. As you know, for my wife, for me to encourage her——

Senator EAGLETON. If she asked your opinion——

[Laughter.]

Senator EAGLETON [continuing]. I am on the panel of jurors.

Senator DECONCINI. That would be a judgment for her.

Seriously, Senator Eagleton, if she said should I serve, I would say yes. That is a duty of a citizen, to serve. But knowing my wife, she probably would serve.

Senator EAGLETON. Would you be at all apprehensive about her service on such a jury if they brought in a verdict of guilty?

Senator DECONCINI. I think that anyone who serves in a criminal trial has certain apprehensions, particularly when the verdict is guilty. Having been a prosecutor as you, obviously there are apprehensions. That is part of human nature. But that is also the responsibility of citizenship.

I cannot say what my wife would feel, but have apprehension, sure I would.

Senator EAGLETON. So you think that the British Government could without any hesitancy restore trial by jury in Northern Ireland?

Senator DECONCINI. Senator Eagleton, if the British had the courage to do what is right and they know what is right—and they had the opportunity and they failed in the early seventies because they did not. They had a change of government, they would not stand behind the sharing of power.

If and when they act, they can implement a better system there of justice. We would not tolerate this system of justice anywhere else, and we ought not to tolerate it, even though this is our closest ally, our good friend.

I have relatives there, and my mother and grandmother come from there. I am very proud of it. It does not make sense because it is not right.

Senator EAGLETON. So while they have this odious system of justice, including trial without jury, you would not extradite?

Senator DECONCINI. I would follow the existing treaty. Under the existing treaty, I would let the system work as it does. If there are abuses—and you certainly point out some hypothetical cases and some real cases that make me think twice about it—then I would like to see it done through the changing of the judicial system in this country, if that was really necessary, rather than singling out a separate special treaty for the United Kingdom and the United States because of their justice system.

That is what I think——

Senator EAGLETON. But there would be circumstances under the existing treaty and under the existing Diplock procedure in Northern Ireland where you would be comfortable in the extradition of PIRA defendants back to the North, indeed, even though they were going to get one-man justice?

Senator DECONCINI. Indeed.

Senator EAGLETON. Even though the burden of proof, as you point out in your statement, might have been switched?

Senator DECONCINI. Indeed. I do not like it, but that is the existing law.

Senator EAGLETON. So the nation of asylum cannot make a judgment as to the quality of due process that the individual will receive back in the original nation? That is, we cannot prejudge what quality of justice a PIRA defendant will get in Northern Ireland? It is not for us to make?

Senator DECONCINI. It is for us to make—wait a minute. For the type of justice system that is instituted for all the citizens, not just the particular defendant that you point out in your hypothetical.

We do not tolerate this type of justice system in South Africa. We have indicated so, and we do not do it in other countries. There is no reason that we ought to do it with the United Kingdom, whether it is the PIRA or any other defendant.

Senator EAGLETON. Under the existing treaty, you would be comfortable with the extradition back to Northern Ireland for trial under the Diplock system?

Senator DECONCINI. By saying that I am comfortable with the extradition does not in and of itself indicate any comfortableness at all with the Diplock system. And I feel that this treaty is promulgated because of that system and because of the failure of the British to have an understanding that our system has a system where people do have a chance to be tried by their peers; that we have an extradition treaty not only with the United Kingdom, but other countries.

There is no reason, particularly in light of the violation of human rights that Great Britain has put upon Northern Ireland by the Diplock system, for us to seriously consider some special relationship with that country under the circumstances.

Senator EAGLETON. You are not recommending that we discontinue the existing treaty, are you?

Senator DECONCINI. I am not.

Senator EAGLETON. Diplock notwithstanding?

Senator DECONCINI. Diplock notwithstanding. Now, maybe we should make some changes based on some of the points you have made, particularly with Congressman Biaggi on the cases. Maybe there should be extensive hearings and changes in the law, but not any special treaty in my judgment.

Senator EAGLETON. What would you think if another country made an evaluation of our system of justice, again using my example of a Farrakahn follower charged with the murder of Mayor Koch in Queens, and the magistrate said: This black Farrakahn follower will not get a fair trial in Queens; I will not extradite.

Senator DECONCINI. These are hypotheticals, Senator.

Senator EAGLETON. These hypotheticals, Senator, are coming into reality. If we had held this hearing 10 years ago, no one, no one on earth, would have thought that a bunch of thugs would have tried to kill the Prime Minister of England in Brighton, no one on earth. [Boos and laughter.]

Even with the encouragement of some of this audience.

Senator TRIBLE. The officers are instructed to clear this room of those people in the back who have interrupted these proceedings.

Senator EAGLETON. They do not bother me, Mr. Chairman, one whit.

You see, hypotheticals are becoming actuality. No one would have thought they would have blown up Lord Mountbatten.

Senator TRIBLE. The Senator will suspend.

This is a controversial issue. There are strong feelings on all sides. The Chairman of this committee will not tolerate these outbursts. Moreover, there are over 100 people outside, waiting rather impatiently to have the opportunity to come and listen to these proceedings.

Most respectfully, I will place you on notice. If there is an outburst like that again, you will be removed promptly. You are invited to stay as long as you will stay and listen quietly to the testimony of the witnesses and the questions of the Senators. Those of you who have grown impatient with these proceedings are invited to leave so that some of the hundreds of people outside might have the opportunity to come and listen.

Senator Eagleton.

Senator EAGLETON. I will conclude, Senator. My point is that things that were considered so remote as to be barbarous 10 years ago, 20 years ago, are coming into reality. I mentioned the bombing at Brighton. Two people were killed there, in addition to the maiming. The bombing at Harrod's Department Store in London, the bombing and killing of Lord Mountbatten on his boat, et cetera—acts civilized people could not contemplate, but only murderous thugs could contemplate.

And thus we consider this treaty in the light of that conduct. That is my point.

Senator DECONCINI. Thank you, Senator Eagleton.

Let me say, I share with you, quite frankly, that I think they are thugs that participated in those kinds of bombings. But that to me is a different issue than the Diplock trials, and if we had bombings here and there was an effort to do away with the jury system, I am sure the Senator from Missouri would be the first to stand up and say that is not the answer to the problem of bombing or whatever it is by thugs in this country, or organized crime or anything else.

And I agree with the Senator, these are thugs and they have got to be dealt with. But you do not deal with the whole society and everybody subject to the Diplock trials in Northern Ireland by doing away with the human rights that are granted to the rest of the citizens of the United Kingdom in this Senator's judgment.

So I have no disagreement with you as to those who would take such violent action.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Thank you, Mr. Chairman.

Let me join both of my colleagues in making very clear what I think Senator Dodd and Senator Biden and others of us who share deep misgivings about this supplementary treaty on this committee, tried to make clear in the first round of hearings.

I recall in the exchange with Judge Sofaer at the time there was an implication in his comments that somehow opposition to this treaty would be interpreted as potentially supportive in some way of the IRA or of actions that have been described by Senator Eagleton thereof. I want to reemphasize this Senator—and I think I

speak for Senator Biden and Senator Dodd—is remotely supportive of those kinds of actions.

Yet we have fundamental concern for constitutional concern. To that end, I would like to ask you a question.

You focus significant attention on the Diplock court system. But I wonder if there is a larger issue—and I think you have hinted at it in your statement. As a member of the Judiciary Committee I would like to hear your comment on—significance of the manner with which we are choosing to deal with this particular issue, which entails transferral of power away from the judiciary, from the judiciary to the executive through this treaty, rather than through the legislative process.

So it strikes me that there is a very significant constitutional question here about the power, who exercises it, about review, judicial review, and where we want to place that particular trust. I wonder if you could comment on that.

Senator DECONCINI. I agree with you, Senator Kerry. I think my statement will point out exactly your proposition. The Judiciary Committee and the Foreign Relations Committee have in the past worked on constructive changes in the extradition laws, and I much prefer that rather than a transfer, as I see this treaty, of the judicial discretion and aspects of discretion solely vested in the executive branch.

That is something I think is not warranted, not taking away from my grave horror that Diplock trials are applied to everyone and in my judgment are an abuse of human rights as well.

Senator KERRY. I will just make one additional comment. We share, this triangle of prosecutors here, the experience of having served in our court system and tried felonies and other kinds of cases. It has been my experience as a prosecutor that, even in our system, many a defense lawyer, given a certain kind of case, given certain kinds of factual situations, would opt for a jury-waived trial because they knew they would have a better shot under those circumstances, and in fact the system would work its way.

I think those of us who have been part of the system have to acknowledge that if in our framework that can happen, to look at what can happen in the Diplock courts is to see an even greater extension of that kind of potential of forum shopping, as we call it.

Second, I would point out that in a case I remember trying against one of the major organized crime figures of New England, everybody involved in the trial had 24-hour protection around the clock. There was not a witness, let alone a juror, who enjoyed it. But I think we are a stronger system for having gone through that.

And if messages are going to be sent——

Senator EAGLETON. When did the protection end?

Senator KERRY. About 1 year later for some. A very, very costly, expensive process.

But I think the messages that were sent by that and the outcome to our own system is beneficial. It seems to me that in the long term such endeavors would in fact contribute to the political solution in Northern Ireland, rather than detract from it.

Thank you, Mr. Chairman.

Senator TRIBLE. Senator DeConcini, we thank you very much.

Senator DECONCINI. Mr. Chairman, thank you for your time and the indulgence of the committee.

Senator TRIBLE. Congressman Hughes.

Is Congressman Fish in attendance? I understood that he also hoped to testify this morning.

The committee is happy to welcome the distinguished Representative from the great State of New Jersey, Williams Hughes.

**STATEMENT OF HON. WILLIAM J. HUGHES, A REPRESENTATIVE
IN CONGRESS FROM NEW JERSEY**

Representative HUGHES. Thank you, Mr. Chairman, members of the committee. Good morning.

I appreciate the opportunity to address this distinguished committee on the proposed supplementary extradition treaty with the United Kingdom of Great Britain and Northern Ireland.

As chairman of the House Subcommittee on Crime which was responsible for drafting H.R. 3347, the "Extradition Act of 1984," in the last Congress, I would like to register my unqualified opposition to ratification of the supplemental treaty being considered today. Though my opposition equally goes to the substance of the supplemental treaty, today I would like to emphasize my several objections to the procedure by which the administration has undertaken to drastically modify our extradition law and practice.

As you know, there is already in force an extradition treaty between the United States and the United Kingdom. The principal effect of the supplementary treaty would be the derogation from over 100 years of American extradition practice and case law by virtually destroying the so-called political offense exception to extradition law.

Of course, this categorical exclusion of violent crimes from the scope of the political exclusion would, as a result of this supplemental treaty, apply only to the United Kingdom. However, Assistant Attorney General Steve Trott recently described the U.K. treaty as the "kind of agreement"—I am quoting—"that we are going to try to pursue with every one of our friends and allies."

Moreover, the legal advisor to the State Department readily admitted before this committee in August that the United Kingdom is "an ideal nation from a moral and political point of view" to begin a process of exempting "stable democracies" with fair legal systems from the restrictions of the political crimes defense.

I strongly oppose this treaty-by-treaty stratagem, which I believe would effectively preempt the legislative process. As a result, our extradition laws will not be consistently applied, but will depend upon the status of the requesting nation as a friend or ally.

It may be instructive to review the events surrounding the consideration of the Extradition Act of 1981. Then, as now, Congress was considering modification of the political offense exception. The initial Senate Judiciary bill, S. 1639, introduced in November 1981, gave the Secretary of State complete jurisdiction over the political offense exception. Shortly thereafter, the administration signed an extradition treaty with the Philippines which likewise proposed transferring decisionmaking authority on the political offense question from the courts to the State Department. Though less radical

than the U.K. Extradition Treaty—which disallows considerations of virtually all violent crimes as political offenses—this treaty would also have essentially destroyed the judicially determined political crime defense.

Interestingly, the administration decided to withhold formal submission to the Senate out of deference to the consideration by Congress of the Extradition Act of 1981. The Senate Judiciary Committee amended this bill somewhat to include an amendment which provided for judicial review of the Secretary's decision. The Senate Foreign Relations Committee, however, reported the bill with an amendment that would return jurisdiction of the political offense exception to the courts. This committee, therefore, rejected a change in the political offense exception much less radical than the one which the administration now advances.

The final bill as amended by the committee and approved by the Senate provided that violent crimes can sometimes be political offenses and denied the Executive sole authority to make that determination.

There is no doubt that the extradition laws are outdated and in sore need of reform. However, as the testimony my subcommittee has heard over two Congresses demonstrates, the very complexity of the issues mitigates against easy or quick solutions. Indeed, the Extradition Act of 1984 was the product of extensive consideration, numerous hearings, and a number of heated markups by the Subcommittee on Crime and the full Judiciary Committee spanning a period of nearly 5 years. That Extradition Act of 1984 included the codification of current case law with respect to the political offense exception, which had strong bipartisan support, with some modification and some I believe improvement. It was a controversial amendment in committee on another issue entirely that ultimately spelled disaster for that bill. It had nothing to do with the political exception.

Over the past several years, the administration has had ample opportunity to engage in dialog with appropriate congressional committees regarding the reform of extradition law. It is invited and urged to continue this dialog. It was a productive dialog. However, I must firmly restate my opposition to this attempt to disregard the record of two Congresses in modernizing, not rejecting, the political offense exception.

I would like to end my remarks with some comments on the substance of the instrument before you. I will not dwell long on the legislative history of the "political offense exception"—suffice it to say that in the context of the history of America as a nation of immigrants, conceived in revolt and as a people consequently sympathetic to struggles for self-determination, the right to refuse extradition of political offenders has become a hallmark of our own democracy. The political offense exception to extradition finds its origins in the writings of Jefferson, Marshall, Webster, and Mill, and should not lightly be discarded.

I wholeheartedly support the administration's stated goal of improving law enforcement and combating terrorism. However, current case law, as well as our codification of it in the Extradition Act of 1984, already requires the extradition of terrorists by denying the political offense exclusion to crimes of wanton and indis-

criminate violence committed with extreme indifference to harming civilians.

Finally, I strongly object to the administration's intention to selectively dilute or eliminate the application of the political offense exclusion. This is neither acceptable legal practice, nor wise foreign policy in my judgment.

Uniformity and equal application of the law are time-honored and unassailable goals in the domestic legal system of a democracy, and we should likewise strive to extend them to the international legal arena. Our own laws of extradition should not be dependent upon the political configuration of the requesting country. Governments which our "friends and allies" one day can change virtually overnight into international foes. I only have to recall Iran and Nicaragua. Moreover, changes in our own administration would also affect the definition of "friend and ally".

Further, we must not forget the other side of our application of double standards, which would be that Americans, both within our national boundaries and outside them, would be subject to differing laws depending upon the particular treaty that encompassed their alleged actions. For example, this supplemental treaty would allow the extradition of an American citizen charged with conspiring to commit acts of violence with rebel forces in Northern Ireland, even though the person had never left the country. However, an American who similarly conspired with rebel forces in, let us say, Afghanistan or Nicaragua, would likely not be extradited since his or her actions would fall within the scope of the political crime defense, which presumably would remain intact with countries not our "friends or allies."

Contrary to the claim of the administration, such selective treaties would most certainly hinder our own criminal enforcement by allowing the extradition of American fugitives to depend upon the particular country into which they chose to flee.

Foreign relations and the interpretation of international law are realistically, even necessarily, the creatures of Executive discretion and resultant political orientation. However, we should not change our laws and our international agreements to reflect the ever-changing orientation of the moment. This is what the Senate is being asked to do if it approves this particular treaty.

The better approach, the far better approach in my judgment, is to finish the last few steps that must be taken to complete the legislative revision of the political offense defense—on a comprehensive, not piecemeal basis—which we brought near completion with our work in the last two Congresses.

I plan to complete that task in the House in this Congress, and I urge that you also pursue this route to modernize the treatment of the vexing but essential political offense exception to the rule of extradition.

I want to say in concluding, Mr. Chairman, that I listened with great interest to a number of the questions and I believe that our committee, after much struggle, developed what I thought was a pretty sensible exclusion to the political offense exception that would be relevant to many of the questions directed by you, Mr. Chairman, and Senator Eagleton.

The exclusions in the legislation that we drafted would include the following: A serious offense involving an attack upon the life, physical integrity, or liberty of internationally protected persons, as defined in that title, including—

Senator EAGLETON. You will have to define that, though. I will let you go on, but nobody can define that. We do not know whether it is the head of government, the head of state.

Representative HUGHES. We can define that.

Senator EAGLETON. How about the Secretary of State for Northern Ireland? Is he covered by that?

Representative HUGHES. I think that would be a policy matter. We would have to decide.

Senator EAGLETON. A policy matter? I thought you were going to define it.

Representative HUGHES. In deciding who would be caught, that would be a policy matter for the Senate and the House to determine.

Senator EAGLETON. How about Mountbatten, a cousin to the royal family?

Representative HUGHES. I think we can come up with a number of examples.

Senator EAGLETON. That is an example. He is dead.

Representative HUGHES. We would have to decide in these instances who we would want to bring within that particular exception.

Let me just finish the others: An offense with respect to which a multilateral treaty obligation of the United States to either extradite or submit for prosecution, a person accused of an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs, an offense that consists of international direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities, an attempt to commit an offense described above.

Now, that exclusion would not be all-encompassing, and the following criteria were developed by our committee as a guideline for the courts in determining whether or not the political offense exception should apply, and this is the criteria that we developed, and I am sure it can be improved upon by the Senate and in our committee, which is an entirely new committee:

A, the status, whether civilian, governmental, or military, of any victims of the alleged offense; the relationship of the alleged offender to a political organization; the existence of civil uprising, rebellion, widespread civil unrest or insurrection within the state requesting extradition; the motive of the alleged offender for the conduct alleged to commit the offense; the seriousness of the offense.

And all those guidelines would not necessarily be all-inclusive. They would just be guidelines for the courts.

But I think what your hypotheticals point out is that the proper forum really to make that determination is our judicial system. Pursuant to the guidelines set down by the Congress, our system has worked extremely well. If it ain't broken, do not fix it.

And the success of this particular item of extradition law I think stands for itself. We have had no problems in applying this particu-

lar exception in our extradition laws. It needs modernizing and we should do that, but it seems to me to throw it all out is just nonsensical. What we need to do is to develop one strategy, not on a case by case basis depending on the country.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Mr. Chairman, I do not have any questions. I would like to ask the committee for unanimous consent to introduce a statement of Dante C. Simbulan, executive secretary of the Church Coalition for Human Rights in the Philippines, on behalf of the Alliance for Philippine Concerns.

In 1981, the Senate rejected a very similar effort of this administration to change the extradition treaty with the Philippines. The coalition was instrumental in pointing out the problems that existed with that treaty at that time, and they have come out against this particular change in the United Kingdom-United States treaty for similar reasons. And I think they are pertinent to the committee's current deliberations.

I would ask unanimous consent for its admission.

Senator TRIBLE. Without objection, it will be made a part of the record.

Senator Eagleton.

Senator EAGLETON. Congressman, you do realize that the existing treaty, to use your phrase, needs modernizing?

Representative HUGHES. No question about it.

Senator EAGLETON. You have given us some guidelines as to how you would do it, quoting from your committee report, and we will consider that.

I think that the treaty before us is flawed.

Representative HUGHES. I indicated the extradition laws need to be modernized.

Senator EAGLETON. Do you think the treaty in existence, not the one being considered, but the treaty in existence between ourselves and Great Britain, should be modernized?

Representative HUGHES. I really have not focused in on that. I do not feel that I have the expertise to be able to share my opinion on that score.

Senator EAGLETON. One of these days we are going to have to focus in on it.

Representative HUGHES. It seems to me what we have to do on a case-by-case basis is, as we deal with other countries in developing treaty obligations, we have to make many of the determinations that you have expressed some concern about today. Are we comfortable with the judicial system in that particular country? That is something that should be relevant to the negotiation of a new treaty with that country or whether or not we enter into a treaty with that country.

Senator EAGLETON. I agree.

Representative HUGHES. That is how we address those problems.

Senator EAGLETON. I think the treaty before us is flawed and will either be rejected by this committee outright or will necessitate some amendment or amendments, and I think the amending process will consider some of the recommendations that you have made in another context. You were talking in the legislative context. We are talking in a treaty context.

Let me throw this at you. Suppose we took the guts of the 1983 and 1984 Senate judiciary bill as a guideline in amending the supplemental treaty. Basically, here is what the bill did. I read from a brief. That committee bill divided offenses into two categories.

One contained offenses that can never be considered political, never be considered political: Acts which have been specifically outlawed internationally, such as hijacking, hostage taking. We would add to that list, obviously, murder, as Congressman Biaggi suggests, and perhaps other crimes, wanton violence, wanton crimes, maiming, et cetera.

Then the other category of offenses, including crimes that would be considered political only "under extraordinary circumstances," and we would list crimes under that category.

Do you think that might be a sensible approach for a starting point in amending the treaty before us?

Representative HUGHES. I would say to the Senator, if in fact the Senate in its wisdom determines that they are going to address this issue on a case-by-case basis, then I would be comfortable with that approach. I think that is a far preferable approach.

However, I think that the process is flawed. I think that, if in fact we should modernize the Extradition Act, it could be a general modernization, not on a case by case basis. I do not think that is good foreign relations. I do not think that is good process.

Senator EAGLETON. I would prefer to do it legislatively. I have said that earlier. But suppose there were enough votes here to report the treaty out unamended. I would say your judgment is you would prefer us to try to clean it up and modernize it, rather than reporting it out in its present form?

Representative HUGHES. That is correct.

Senator TRIBLE. Senator Sarbanes.

Senator SARBANES. I am interested to know where you are in the legislative process on the House side with respect to the more general approach that you have been advocating.

Representative HUGHES. We are bogged down with E.F. Hutton, so we have not done much of anything on extradition this year. It is my hope that we can once again begin a dialog with the State Department, which 5 years ago came to us and indicated their desire to move an Extradition Act, as well as the Justice Department.

But I think we have the nucleus of a hearing record from which we can advance a bill in this Congress. Unfortunately, we were derailed in the full committee by an amendment which we took, which was ill-advised, which I opposed, which dealt with another issue.

Senator SARBANES. Which issue?

Representative HUGHES. That dealt with not the political offense exception, the "rule of noninquiry". It was an amendment that we took in full committee, and I was able to get the votes to turn it around in conference in the closing days of the 98th Congress. But unfortunately, we just did not reach it.

But in any event, we were sidetracked on that.

Senator BIDEN. You hardly reached anything then, Congressman.

Representative HUGHES. That is true.

Senator EAGLETON. The "rule of noninquiry" is an important issue, is it not, however you come down on it?

Representative HUGHES. Yes; it is important.

Senator EAGLETON. Independent examination by the asylum nation of the due process of the receiving nation would have to be reciprocal and done to us as well.

Representative HUGHES. I supported the administration's position that the "rule of noninquiry" should inhere in the Secretary of State.

Senator EAGLETON. That has been a tradition from time immemorial.

Representative HUGHES. It has served us well and that is where it should inhere, and it came out of the subcommittee unanimously that way. Unfortunately, it was turned around in full committee, and I refused to move the legislation for the better part of a year because I had some difficulty getting sufficient support for that position.

Senator SARBANES. I am not quite clear why, if you have brought this legislation as far as you have in 1984—as I understand it, you had a bill from the committee to go to the House, is that correct?

Representative HUGHES. Yes.

Senator SARBANES. But not taken up in the House?

Representative HUGHES. We took it up, but it was defeated. I took it under suspension to move it. I had the sufficient votes among the conferees that would have been appointed to turn that issue around.

But unfortunately, it got caught up in the heated battle over the Comprehensive Crime Control Act. Some of my colleagues defeated it, not on substance but on procedure.

Senator SARBANES. That only lends additional weight to the question I am getting ready to put, and that is, Why, if you brought a complicated piece of legislation as far as you have and if the reasons that it did not move further were in a sense unrelated to the legislation, were external to it, why nothing has been done for a year in this Congress?

I guess the question I am really putting is why was this sort of general legislation not moving earlier this year, given how far it had come before and given that its failure to move further was, as I understand it from your responses, unrelated to the bill itself?

Representative HUGHES. Two reasons. First of all, our subcommittee has been extremely active on white collar crime issues and we have just been up to our eyeballs wading through documents. I have got the staff working 7 days a week, along with the General Accounting Office, on E.F. Hutton. That has taken us a lot longer than we anticipated.

In addition to that, there were other pressing matters that we took up, such as money laundering, which the administration has made a high priority, and we are endeavoring to move that legislation. We developed some problems with other bills, forfeiture and other bills we have endeavored to address, and there has not been time. That is the first reason.

The second reason is, I have asked the State Department and the Justice Department to indicate to me just how much of a priority it is. It is not a priority at this point with the administration.

Senator SARBANES. Was it a priority with them before?

Representative HUGHES. It was, with the State Department in particular. The State Department came to me 5 years ago, as a matter of fact, and asked me and Hal Sawyer, who was the ranking Republican from Michigan, if we would begin to craft an Extradition Act, and we agreed to make that a priority and we worked on it for two Congresses.

Senator SARBANES. Why do you understand they no longer have it as a priority, particularly since you were approaching the stage of having some legislation?

Representative HUGHES. Because their priority is in other areas. Money laundering is a priority with them. E.F. Hutton happens to be a priority of our Judiciary Committee. Chairman Rodino, when he assigned that matter to my subcommittee, asked if I would make that a high priority in this Congress.

Senator SARBANES. Those items are a priority with the State Department now, or with the Justice Department?

Representative HUGHES. I have not received word from the State Department that they want to move on the Extradition Act.

Senator SARBANES. Were they not the ones who came to you 5 years ago?

Representative HUGHES. It was the State Department initially.

Senator SARBANES. It was the State Department. Now, why do you understand the State Department is no longer treating extradition as a priority item?

Representative HUGHES. I do not know, Senator. You have to ask them. They have not shared that with me.

Senator SARBANES. I apologize, because I really should be more familiar with the terms of your proposed bill. But did it allow an appeal from a determination by the district judge on the political offenses exception?

Representative HUGHES. It did allow for an appeal.

Senator SARBANES. On both sides?

Representative HUGHES. Yes.

Senator SARBANES. And what is the current law on that?

Representative HUGHES. It does not provide for an appeal, as I understand it. But our legislation did provide for an appeal process.

Senator SARBANES. Whichever way the judges rule?

Representative HUGHES. That is correct.

Senator SARBANES. What is the current law? Is it only appealable if it is ruled against the person for whom there is an extradition—

Representative HUGHES. It is my understanding there is no appeal from any determination.

Senator SARBANES. And what was your thinking in providing for that?

Representative HUGHES. We felt there should be an appeal, both on the part of the Government as well as on the part of the individual sought to be extradited.

Senator SARBANES. Does the committee have any plans to work on extradition legislation?

Representative HUGHES. There is a habeas corpus process that would be available to the individual.

Senator SARBANES. Under current law, if the judges ruled against them, is that correct?

Representative HUGHES. That is correct. Our process permitted appeal both by the Government as well as by the individual, even though there have not been too many cases. We have been embarrassed at times at having to face requesting jurisdictions when a magistrate has for we believe erroneous reasons denied extradition.

Senator SARBANES. Is there a plan now in the committee to work on the extradition?

Representative HUGHES. In the next Congress, it would be one of our priorities, in the second session of this Congress. As I indicated to the Senator, we worked up a shopping list. We sat down with my ranking Republican, who is now Bill McCollum of Florida, we sat down and endeavored to work up a list of priorities.

On extradition, because the State Department had not shown any interest in moving it it was moved to the second session.

Senator SARBANES. In the course of your work on the extradition legislation in 1984 and earlier, did you compare the provisions governing extradition, as they apply between the United States and other countries, with the comparable provisions in the various international or regional conventions affecting extradition?

Representative HUGHES. Not extensively, because we were attempting to develop a process, a general process. The limited amount of comparison that we made to international accords from treaty to treaty between countries convinced us there is a great deal of disparity and a need to do much in trying to modernize many of the treaties.

There are a number of inconsistencies and there has to be, of course. There will be some differences from country to country, because we do negotiate them, obviously, on a bilateral basis.

But we looked at the process more than the differences between treaties and international accords.

Senator SARBANES. Is there a particular convention or agreement that has been reached? I know the European Community, for example, has developed one such, have they not?

Representative HUGHES. I am really not sure. I am not really certain of that.

Senator SARBANES. So, there is no convention to look to as offering a reasonably perceptive and intelligent resolution of some of these extradition questions?

Representative HUGHES. No; because all countries obviously are handling it somewhat differently than we do. Their laws are different, and as a result we did exclude all international treaties from the political offense exception, just trying to deal with the various inconsistencies. So all were excluded from the political offense exception. That is one of the categories we excluded.

Senator SARBANES. To what extent do you think that, in shaping our view toward the political offense exception, we should be influenced by the general formulation of international law on that question?

Representative HUGHES. I think that is a relevant consideration, but I think in the final analysis we have to craft our own based upon our own laws, our own traditions, use as some guidance the

international accords that we have, the international standards. And standards do change from time to time.

But we have endeavored to create some general criteria as a guidance to the courts. But once again, the major concern is the political offense exception. That generates much of the controversy involved in the extradition laws. I think the far better approach is to have the judiciary continue to administer that on a case-by-case basis. It has served us well in the past.

The courts have managed over the years to, in fact, interpret the law in each relevant period in a way that has done justice to the individuals and brought credit to our system. My main concern is to change what has served us well, and that is what this supplemental treaty would do in essence.

Senator SARBANES. I see my time is up, Mr. Chairman. I want to thank Congressman Hughes for his testimony. He is a very able and thoughtful Member of the Congress and we appreciate him coming here to testify.

Representative HUGHES. I thank the Senator.

Senator TRIBLE. I have been interested in the colloquy between the Senator from Maryland and the Congressman from New Jersey.

And I would simply observe that perhaps part of the problem encountered by the Congress in the last session in resolving this legislation may lie in the inherent difficulty in drafting legislation that applies in equal terms to the vastly different nations of the world. Obviously, Iran and Israel and the United Kingdom and the Philippines and the other nations of the world have vastly different political and judicial systems, and perhaps we should recognize that.

That certainly is a strong argument for approaching these questions on a bilateral basis, as opposed to a broad legislative mandate. But that is an issue that we will obviously pursue with special interest.

Senator Biden.

Senator BIDEN. Mr. Chairman, I want to pick up where you left off.

Senator SARBANES. Would you yield for just a second?

Senator BIDEN. Sure.

Senator SARBANES. I just want to make something clear, Mr. Chairman. You made your comment on the heels of my questioning. I do not think my questioning necessarily led to the conclusion that you have just expressed. This is a very difficult and complex issue. There are some strong arguments both ways, but there are obvious problems if we are going to go down the path of negotiating a separate approach with all 159 countries around the world, I think.

I take it that is the thrust of Congressman Hughes' testimony.

Representative HUGHES. I could not agree with you more. I also would say that we are talking about developing a process. Certainly, we have to have one process. We do not need 159 processes or whatever.

We need one process, and we can provide guidance to the courts on the most controversial aspects of our extradition law, and that is the political offense exception. We can provide a codification and

a modification of that which can serve us well. It has served us well from the very founding of the Republic.

It certainly does need some modification, but we can do that generally and that is the way we should do it, to deal with all of the countries that we have relations with.

Senator SARBANES. Thank you.

Senator BIDEN. Thank you.

I would like to point out by saying, that is exactly the case you made, since I was part of your problem last time with the treaty. I was insisting that we pass the crime bill. All of our colleagues should know, it had nothing to do with the difficulty of getting comprehensive a treaty that was.

It had to do with the politics of whether we could get up a comprehensive crime bill, and I take the blame. I am more responsible than anybody in seeing to it that the extradition treaty, on something having nothing to do with extradition, was put at the bottom of that and that the drug question was brought up.

That is all the fight was about. It had nothing else to do with anything else in terms of what we took up in conference. And as the ranking member of the Judiciary Committee, it is our intention to proceed in the legislative route, as the Senator from Missouri pointed out.

I would like to point out to the man that I think—and I am not being solicitous—is the most able lawyer in the Senate, the Senator from Missouri that old adage from law school: Hard cases make bad law. That is what we are doing here. We are making bad law off of hard cases.

We have had in the 40-year history of this extradition treaty four arguably bad cases, and I only say arguably bad, four cases in the entire history where in fact the political offense was offered as a defense and was accepted.

And I am going to say something that will probably get me in a lot of trouble, but the question was asked why the State Department is not pushing the other route and why this route is being pushed. We have been around here long enough, most of us—I have been around here 13 years, the Senator from Missouri longer than I—it has not gone unnoticed by me the personal and special relationship that the Prime Minister of England and the President of the United States have.

I can find no other explanation other than that the Prime Minister of Great Britain said to the President of the United States: This is a big one for me; I want this one. I think that is the answer to your question why this is where it is today, and not why we are pushing the legislative route as they had in the past. Obviously, the President does not confide in me, nor does Mrs. Thatcher confide in me.

One last thing I would like to point out—actually, Mrs. Thatcher kind of liked me. I am the guy, if you remember, to the chagrin of many of my Irish friends, who was the person who for 7 hours argued with Senator Helms that we should go on record in support of the British in the Falklands.

At a breakfast we hosted for her, she thanked me profusely for that. But I warned her that if the day ever came that Chairman Pell decided he did not want to be Chairman and decided to take

the Rules Committee, which rumor has it he would rather be Chairman of Rules than Foreign Relations. [Laughter.]

She would probably have trouble with me, too. But—that is right, that is how these crazy rumors get around, Clay. You do not have to sign onto that.

But all kidding aside, we are at a point here—and I am not going to ask you a lot of questions, because we have discussed this a lot in our comparable responsibilities on the Judiciary Committee.

The Congressman from New Jersey, who by the way, is the single most effective man in the entire U.S. Congress on the criminal questions, criminal laws of this country—I mean that sincerely. You are, you are the single most effective person we have.

Representative HUGHES. I am flattered.

Senator BIDEN. Let me get down to this issue. It seems to me the problem that we have with this treaty is that Senator Eagleton's examples I think are legitimate examples. I think that, notwithstanding the fact that there are those in the audience who are totally out of line, who booed about Mountbatten, there were two young boys killed with Mountbatten.

The hell with Mountbatten. Let us say you do not care about Mountbatten. There were two young boys killed. That is an outrageous act, an outrageous act.

But on the other side, I can and I will for the processes of this hearing point out, I believe, to the Senator from Missouri, that if this treaty were in place there are equally as outrageous things that could occur with regard to the civil liberties of the people who are seeking to be extradited.

It is unfortunately one of these cases where we can go from one example of horror to another. I can match you with horror stories in terms of what will happen if this treaty were to pass, and that is why we have been pretty wise for the past 40 years. We have essentially left all of these kinds of questions that require ad hoc decisions to the courts, given them very broad guidelines.

And I think we are at a point of hysteria here about, in the 40-year range of this treaty, four cases. And now we have an urgent, absolute need to rush this treaty through. I think what is emerging here, will some of—whether it is the irrational opposition to this treaty which I found from some who have contacted me to the rational opposition of this treaty—and it spans the spectrum—is that there is in fact, at a minimum, a feeling that the legislative approach would probably be better, number one; and number two, that we in fact in this committee have not had enough time to thoroughly investigate this treaty.

And today, I might point out—I thank the Chairman and our presiding Chairman today, but the chairman of the full committee, for having this extra day of hearings. We were not even going to have this. There are 40 witnesses who are not even able to testify. They are not people who lack knowledge on the subject. Some come with their own brief for or against the treaty.

But that is the nature of our history. As Irish and English, we have 300 years of brief, longer than that, that we can trade insults and trade atrocities. We sure are not going to settle it, in my view, in a couple of days in this hearing.

So I think we are going to need more hearings. The reason I am not asking questions is, and I made no opening statement, is to set the record straight from the perspective from which I sit on this and to say to the chairman of the Criminal Law Subcommittee of the Judiciary Committee that as ranking member of the Judiciary Committee I commit to you that I will work expeditiously with you for us to produce, which we came pretty close to doing last time, a treaty, that failed, but not for want of a definition as much as it did for want of an opportunity because of the nature of the calendar and what took precedent over it at that moment.

And the last thing I will say is to remind my colleagues once again, so there is no confusion on why the extradition treaty did not go forward, you remember at the end of the last Congress at the last hour I was running around to each and every one of you begging you to sign on the comprehensive criminal law bill.

And in order to keep off what I believed to be some less than judicious pieces of legislation introduced by some of my very good friends on the right, the political right, we had to make an agreement to just narrow down the content of that bill, which turned out to be the single most comprehensive bill that was passed since the criminal code was formed. So that is why it happened. It was not because of any overwhelming difficulty.

I have several questions, four actually, but I will submit them to you in writing, Congressman, and ask if you would make them available for the record, and suggest to you that I truly believe your approach is the correct one. We may not ultimately agree on the final detailed definition, but we certainly agree that the way to approach this thing is: A, legislatively; B, comprehensively; and C, to leave discretion to the courts.

We have had bad judges, we have had bad decisions in every single solitary decisional area and application of the law. There have been juries that have made egregious conclusions on the innocence and guilt of people. My colleagues do not come up here and say, I can cite you 500, which we probably could, cases where the jury system is an abject failure, let us eliminate the jury system.

I suggest to you we are overreacting, and I hope we can slow this train down so that we can intelligently move forward on what must be addressed, but is not being addressed nearly as badly as it is perceived to be under present law.

Thank you very much, Mr. Chairman.

Representative HUGHES. I would be happy to respond, Senator.

Senator TRIBLE. Thank you.

Senator Dodd.

Senator DODD. Mr. Chairman, first of all let me welcome, my former colleague from the House. I had the pleasure of serving with Congressman Hughes on the Judiciary Committee. We were elected together and arrived in Congress the same day 11 years ago. I have nothing but the highest regard for his ability as a legislator and for his remarks here today.

Representative HUGHES. You made a lot better decisions than I did, though.

Senator DODD. Not necessarily. I have often thought that a 6-year term in the House would be the ideal. [Laughter.]

Quite frankly, I knew you would take it. My colleagues would as well.

But I want to compliment you here on your testimony. I want to compliment the chairman as well for having this second day of hearings. As Senator Biden so accurately points out, this was originally going to be a 1-day affair, but it is obviously an issue of importance, not only because of what many of us feel are fatal flaws in the proposition before us, but also because it sets a precedent.

There are situations around this world that, although not exactly identical, but are close enough that we could find ourselves in a situation where other countries demand equal treatment from us and we would be put in a very awkward position. The President would be put in a very awkward position. Certainly this committee would be in a very awkward position, were we to apply double standards on issues such as this one.

And that is in effect what we are being asked to do, because I doubt that under any other set of circumstances we would be willing to accept the same kind of treaty we are being asked to accept here today.

So I would say to my good friend Congressman Hughes, Mr. Chairman, and everyone else here today that, frankly, as a member of this committee I am not at all satisfied. And if I were asked to vote on the proposition before us, I would vote against it.

I am hopeful that this message will be heard by the State Department and others so that they go back to the drawing boards and present us with a proposition that is far more equitable and far more intelligent than the one we are presently being asked to support and adopt.

Let me add that I do not think this will be adopted by the Senate, not because of people's views one way or the other on the question of Northern Ireland, although that might be enough for some, but rather for the issues you have pointed out. The rationale for this proposed problem clearly does not apply alone to Northern Ireland.

This is a fatally flawed document. It would be bad precedent for the United States to associate itself with it.

I thank you for coming.

Representative HUGHES. Thank you.

Senator TRIBLE. Thank you, Senator Dodd.

Senator Pell.

Senator PELL. Thank you very much, Mr. Chairman.

I recognize the jurisdiction that the Congressman has over criminal actions and extraditions, so we are particularly lucky to have him as a witness. And I think these things are kind of subjective. I remember when I had two of my staff members killed in a very short period of time by drunk drivers. We worked with Congressman Borens and we got through the Borens-Pell drunk driving bill, which had an effect.

I am somewhat moved the same way now, because on the one hand I think the system has worked pretty well as is until now. The judiciary has been very fair. There have been few exceptions to it. I see no great reason to change it. On the other hand, I wonder in a personal way at some of the people who have been assassinated in the areas we are talking of.

I would like to ask a specific question here. One friend of mine, Tony Berry, was assassinated at a time, murdered at a time, when the bomb went off at Brighton for Margaret Thatcher. Let us say we found his murderer in America. What in your view would the court's interpretation of or the court's ruling with regard to his possible extradition under present law be?

Representative HUGHES. In my opinion, that would be extraditable under the law.

Senator PELL. And also, in connection with Dicky Mountbatten, who was a friend and who was connected to my marriage, if his murderer was found in America in your view would he be extraditable?

Representative HUGHES. Extraditable under our present law and extraditable under the Extradition Act of 1984 that we developed.

Senator PELL. There would be no real reason to change the law.

Representative HUGHES. That is correct.

Senator PELL. Thank you very much.

Senator TRIBLE. There certainly is case law that would suggest otherwise, that they would not be extradited.

Representative HUGHES. There have been a few bad cases. But as the Senator from Delaware amply stated, sometimes bad cases make very poor law.

Senator TRIBLE. Can you identify a good case that supports the proposition that you have advanced?

Representative HUGHES. Basically, the courts have been applying the standard that pretty much tracks the criteria that I enumerated for you. That criteria was the status of the individual, the relationship of the alleged offender to a political organization. The existence of civil uprising or rebellion is taken into account; the mode of the offense; the nexus of such alleged offense to the goals of the political organization; the seriousness of the offense.

All those factors are taken into consideration by the court, and in fact we do codify—we did codify in our Extradition Act an exclusion for such types of offenses, an offense which consists of potential or direct participation in wanton or indiscriminate acts of violence with extreme indifference to the risk of causing death or bodily injury to persons not taking part on the armed hostilities.

This is the exclusion.

Senator TRIBLE. This is in the proposed legislation?

Representative HUGHES. It tracks current case law.

Senator TRIBLE. I would only observe that, given the differences of opinion of courts on the subject, there is a substantial question in my mind whether the answer to the questions posed by Senator Pell would be yes or no. It is for that reason I suspect that this legislation and the proposed treaty is before us.

Senator EAGLETON. You should also note, Mr. Chairman, it is the opinion of a magistrate court, and that opinion is not appealable. If the magistrate rules against the extradition, that is it. It is a magistrate, wherever he may be from. That is the final law. He is the Warren Burger of the situation.

Senator PELL. Maybe what is necessary is some kind of compromise language that would have the power of appeal from that magistrate's court. Not being a lawyer and everybody else at this table being a lawyer, I am sure you could devise such a system.

Senator KERRY. That is a guarantee that we will not be able to do so. [Laughter.]

Representative HUGHES. That is the reason we should be developing a comprehensive bill that sets forth the guidelines which will in fact provide that type of instruction to the courts in applying the political offense exception.

Senator BIDEN. Would the gentleman yield on one point? You said, can you name any instances where it has worked, where the treaty has worked? I have asked the State Department to submit for the record a case where extradition has been sought and has been fought on the grounds of the political offense exception.

We are in the process of doing that. We will attempt to submit that.

And second, I will just point out that only in 40 years—I am not talking about just this treaty that is in effect. In 40 years there have been only four cases that anybody can point to in dispute, and in only two of those cases that people really care, that the administration and apparently the British care a great deal about right now.

So if it is as bad as you say and that everybody says it is, it is so horrible, I wonder why there have not been more. But we will submit for the record to the extent we can lay our hands on it those cases where the political offense doctrine has been interposed as a defense and in fact the person has been extradited.

Senator DODD. Would you yield?

Senator BIDEN. I would yield. I do not have the floor.

Senator DODD. Is one of those cases the James Barr, B-a-r-r, case? This was a case that was decided this year on August 25.

Senator BIDEN. I do not know.

Senator DODD. In Philadelphia.

Senator BIDEN. That was decided on probable cause, probable cause grounds. I do not believe it even got to the political offense doctrine in that case.

Senator DODD. They threw it out entirely. But I think it is worth noting, that this particular case is the most recent one decided by a court after State Department and the Justice Department, complying with the request for extradition, had Mr. Barr arrested in Philadelphia.

The judge threw the case out summarily, but I cannot believe they even reviewed the matter. I would like to know if they did or not. It is a page and a quarter of a statement by a Supergrasser, and he makes one reference to Mr. Barr. It says:

In the meantime, Jim Barr from Twinbrooke, who was a volunteer in the Andersonstown unit, arrived in his car, which was a Renault, green color. I told him we were going to have a go at the Brits. I also told him to scout around the top end of Clinard Street for any other foot patrols.

This is the only reference to Jim Barr; and yet the State Justice was prepared to have him extradited. The court threw it right out. The judge would not even come close to giving it consideration.

But this is the sort of case that reveals the weakness of the treaty. For if it were adopted, individual like Mr. Barr with only a shred of hearsay evidence against him, would be extradited. This is the danger, I think. [Applause.]

Senator TRIBLE. Senator Dodd, it would seem to me that that case would not be affected by this treaty. This treaty narrowly makes exceptions to the political offense doctrine, and those are for murder and other defined offenses, and that would not apply to a case of loitering in the vicinity of a criminal offense.

Senator KERRY. Mr. Chairman, if I could just——

Senator TRIBLE. I am not sure this is really taking us anywhere, gentlemen. We are operating on my time at this point.

Senator Dodd, we will surely make that case a part of the record. Can we not postpone further discussion of this case, this tangent, to later on, so that Congressman Hughes can be excused and we can move on with the proceedings? I do not wish to cut off my colleagues, but I am not sure this is an all-important point to pursue.

Senator KERRY. I am not going to pursue that particular case, Mr. Chairman. I just wanted to follow up on your point, however, and point out that the distinction here is that what happens as a result of these changes, you have executive discretion supplanting the judicial, and therefore you do not know whether or not it would in fact affect it. I think that is what my colleague is saying.

Senator DODD. That is the whole point.

Senator KERRY. You have taken and supplanted a whole new form of discretion where, given the current relationship, one might only speculate as to the outcome. But I think that speculation alone gives rise for alarm on the part of those of us to feel that some other route ought to be pursued, whether it is that case or any other case.

Senator TRIBLE. Senator Kerry, I must bring this to a close. Senator Pressler is here and I have not called on him for questions. For that I apologize.

Let me say for the record that the chairman is following the procedure of recognizing Senators as they have appeared at this hearing, which I think is the best way to proceed. And I would thank my colleagues for their patience with this new procedure.

Senator Pressler, you are most welcome and we await your questions.

Senator PRESSLER. Great. Thank you.

First of all, let me apologize for being late to the hearing. I have been at two others this morning.

I too join in complimenting my colleague from the House on the expertise that he brings. It is a real struggle to understand this treaty. I quote from a New York Times editorial and I would like your reaction to this statement which appeared on, apparently, July 11, 1985:

The right of asylum is not jeopardized when democratic countries with similar legal systems agree to extradite all those accused of violent offenses without political exceptions. An old and generous impulse is mocked when the lawless can play one nation's laws against another.

Then it goes forward. The editorial suggests reconsidering the old doctrines of asylum as a vital complement to a serious antiterrorist campaign, but especially, "The right of asylum is not jeopardized when democratic countries with similar legal systems agree to extradite all those accused of violent offenses without political exceptions."

I guess that is what your testimony has been about, but it surprised me that the New York Times, which usually takes a very, I would say, an American Civil Liberties Union point of view, if I can say that—and I say that very complementarily. I was confused. You might not normally expect the New York Times to be where it is on this.

Representative HUGHES. I think that that basically is a little bit of an oversimplification. I think that the process is so important, and I think that we can develop a process that can serve as well in dealing with democracies and other nondemocracies around the world. I think that is the point I made.

The process, including the political offense exception, has been extremely ably handled by our judicial system. That is where it should inhere. The standards need to be modernized. The process needs to be modernized. What we should be doing is attempting to deal with it comprehensively, not on a case-by-case basis. Even democracies vary.

As the Senator well knows, we have gradations and differences which adhere in each system. It seems to me that we better serve our foreign policy and our own judicial system if we develop a process that is fair, consistent with our traditions, which takes into account the international norms, but at the same time advances what we now realize is a need to take a look at situations that heretofore may not have been considered by courts, that tries to provide them with general guidelines, not specific guidelines, so that they can continue to deal with the cases on a case-by-case basis.

It seems to me that is the point of my testimony. If, in fact, we had had major problems with our system, that would be one thing. But we have not. It seems to me that we get ourselves caught up in the wrong process when we begin to negotiate on a case-by-case basis with allies or foes.

Senator PRESSLER. In your testimony you said that this treaty would circumvent the legislative process. Treaties must be approved by two-thirds of the Senate. How is that circumventing the legislative process?

Representative HUGHES. The process—Congress is the policymaking branch that determines the process to be applied. If we had not embarked on a good faith effort to try to modernize, that would be one thing.

But we have. We have spent some 5 years attempting to create a statute that makes some sense, and we developed a consensus in the last Congress. It is just unfortunate that it was derailed on other not particularly relevant issues. But it is the legislative branch that is the policymaking branch in this area, not the executive branch.

Senator PRESSLER. The Irish, Ireland itself, and the Irish Republic, are you familiar with what kind of extradition treaty they have with Great Britain?

Representative HUGHES. I really am not, Senator.

Senator PRESSLER. I was going to cite the Chicago Tribune editorial which, if I understand it correctly, states the Irish Republic itself has requested and has an extradition treaty similar to this with Great Britain. I would ask to submit that editorial into the record.

Representative HUGHES. I might say to the Senator that on that issue and also the issue of case law, there are four or five cases, a handful of cases that represent cases that we think deviated from what was standard and traditional practice in this country, all cases I can furnish the committee.

We took a great deal of testimony and we have much of that information, including many of the treaties that we looked at. But I cannot recall offhand anything about that particular treaty.

Senator PRESSLER. Thank you very much.

Senator TRIBLE. Senator Pressler, thank you.

Do any of my colleagues have additional questions?

[No response.]

Senator TRIBLE. If not, Congressman Hughes, we thank you very much for the time that you have granted the committee, and we thank you for your thoughtful testimony.

Representative HUGHES. Thank you, Mr. Chairman.

Senator KERRY. Mr. Chairman, may I just inquire of the Chair what the Chair's intentions are with respect to the hearings? I guess it is obvious we are going to have a difficult time hearing all the people that we want, and I think some of us would like to try to guarantee that we have them.

Senator TRIBLE. Senator Kerry, I am endeavoring at this point to resolve that question. Obviously, we have a much longer agenda than we can possibly finish this morning. I would like to adjourn at 12:30 for an hour and then return at 1:30 and continue with the day's proceedings.

There is a question of whether we can secure a room. The staff is now trying to find a place where we can meet this afternoon. I would hope that we can complete today's agenda and hear from all these witnesses.

Senator KERRY. Thank you, Mr. Chairman.

Senator TRIBLE. Senator McCarthy. Senator McCarthy, you are warmly welcomed back to the Senate. We thank you for your presence today.

STATEMENT OF HON. EUGENE J. MCCARTHY, FORMER U.S. SENATOR

Senator MCCARTHY. Thank you.

Mr. Chairman, members of the committee, when a Member of the Senate I proposed for one of the committees on which I served, that no witness should be heard who had not listened to all previous testimony, and who was not committed to hearing all that followed his testimony. I have read testimony already given, and have been listening in the outer room to what has been said by the witnesses who have preceded me. I have come to the conclusion that if I were a member of your committee, and the chairman were now asking whether I had any questions, I would answer "no." The case has been well spoken to. I am reduced to the position of being without anymore answers—or very close to that position.

But there are not or two points that I would like to make to the Committee, in part because, If I apply a principle I once enunciated, I may not be qualified to speak on subjects of current interest in the future. The principle was stated under some pressure when,

having been severely criticized by a former Senator who had written his memoirs, I declared that no senator who had written and published his memoirs should be consulted or heard on any contemporary problem. I have not written my memoirs, but at the prices now being paid for political memoirs, I might be tempted. The offers I have received up to now have been so modest, I would be ashamed to make them public.

The market seems to be expanding at this time.

The Senate has a very special interest in the matter before you. Tacitus, the Roman historian, listed four guidelines for ideal civic conduct: "virtus, patria, libertas, senatus." The first three—virtue, patriotism, and liberty—were qualities he saw necessary in all Roman citizens. The fourth, "the senate," was an institution essential, he thought, to the strength and survival of the Republic.

The men who drafted the Constitution of the United States and defined the role of the Senate under that Constitution were sensitive to the role of the Roman Senate. The Constitution gives to the Senate a strong defensive role, check the House of Representatives on some matters, the Executive Branch on some others, but it gives the Senate a positive role in two other fields—the operation of the judiciary and the conduct of foreign affairs. Both of these responsibilities are involved in the extradition treaty now before you.

The judicial aspects of the case have been well-covered by witnesses who have preceded me. The procedural point that a right approach to action involves legislation by the U.S. Congress, including the House of Representatives, rather legislation by two-thirds of the Senate concurred in by the British Parliament is valid.

The point has also been well-made that this is not, as the New York Times recently described it, a simple transfer from one jurisdiction to another, both of which have essentially the same standards of judicial procedure, as though one were extraditing an accused person from, say, New York to Michigan. Senator Pressler cites it in the New York Times in what seemed to me a rather careless and ill-informed editorial—if it was in the Monday edition, you do not hold them responsible. [Laughter.]

Northern Ireland, where accused might be extradited under the terms of this treaty, has been governed by emergency legislation since it was established as separate from the Irish Republic in 1922. The law stands at the will of the British Parliament. "The Emergency Provisions Act of 1978," combined with "The Prevention of Terrorism Act of 1984," is the law and judicial procedure by which someone who has sought political system in the United States would be extradited. The law is not operative under Constitutional limitations. It could be changed tomorrow; made worse, or better.

As it now stands, the law places the burden of proof on the accused. The right to stand trial by jury is removed. The right of Habeas Corpus is scarcely recognized, and the right to immediate access to lawyers is denied. Evidence gained before consultation with counsel is admitted and uncorroberated; evidence from accomplices or informers is admissible. Other practices are tolerated which do not meet American standards of due process or equal protection under the law. It would be strangely contradictory that in a time when the United States is making respect for human and civil

rights central to its foreign policy, in many parts of the world, that it would, with references to this treaty, be indifferent to that wider commitment.

I think the point made by Senator Dodd and others, and also sustained, by Congressman Hughes, who talked about what the House is doing in their legislative approach, that this supplemental treaty probably should be rejected on the consideration of human rights and judicial procedures and the American tradition of law and order.

The second field of Senate responsibility, that for U.S. foreign policy, which cannot be clearly separated from that bearing on civil rights, is also involved in this treaty. Although I think the case has been made for a rejection of this treaty solely on the consideration of judicial procedures to which extradited persons would be subjected, or might be subjected, the political implications should not be overlooked or ignored.

It is unnecessary to say to this Committee, that the cloak of political activism does not excuse the use of any methods one chooses to use, despite the precedent set by Cromwell, who, when criticized for Pride's Purge and for the execution of the King, advised his critics not to question the methods used by those who are God's agents. "Perhaps," he said, "there are no other means." Resistance to British rule in Ireland is traceable to the first invasion of Ireland by the English, or what passed for English then, in 1171. Since then the resistance has been demonstrated intermittently by political leaders, but continually by bards and poets, whose works moved Queen Elizabeth to the direct suppression of minstrels, rhymers, genealogists who sustain, she said, "The Irish Lords and gentlemen in their love of rebellion and other crimes." The line from Elizabeth to Margaret Thatcher is clear. I think Senator Biden was correct when he said that he suspects that somewhere along the way in recent meetings and exchanges between her and the President of the United States, she asked for a boon, the extradition treaty, which by a change of language would make those who oppose British rule in Northern Ireland terrorists, rather than political opponents.

In the invasion of Ireland, repeated invasions, the establishment of sovereignty was not over empty or sparsely populated lands, as in Australia or Canada, but over both land and people. And so the contest has gone on for centuries, with some of the Irish people continuously rejecting British claims to sovereignty, and the British responding with force, oppression, and cruelty.

The purest example was given by Cromwell, who ordered his soldiers to break the harps found in the Irish cottages, and also ordered the massacre after the battle of Drogheda, an action which he explained in the message he sent to the Speaker of the House of Commons, saying "It has pleased God to bless our endeavor at Drogheda . . . the enemy were about 3000 strong in the town. I believe we put to the sword the whole number . . . This has been a marvelous great mercy. . . ."

Not all of the oppression of the Irish was so crude and bloody. In the age of Enlightenment, learning and study was suppressed in Ireland, leading to the Hedge Schools. Whereas the Irish language was largely stamped out, the Irish had their revenge in using the

English language, which was forced upon them, better than the English themselves can use it. Irish trade was suppressed in the seventeenth and eighteenth century, and near the middle of the nineteenth century, the great famine, a kind of fifty-percent genocide, was tolerated if not promoted.

And so controversy has run on reaching its high point for this century in the Easter Rising of 1916, which set the stage for establishing the Irish Free State and also for the division of Ireland into North and South. It left new heroes for Ireland, men like Connolly and Pearse, McDonough and McBride, and Roger Casement, whom the British were not content merely to execute, but proceeded to ruin his good reputation after his death, an action described in Yeats' poem in these words,

Afraid they'd be beaten
before the bench of time
They turned a trick in forgery
And blackened his good name.

with a purger standing ready to prove the forgery true but leaving forever, as Yeats notes in another poem, *The Ghost of Roger Casement*,

The ghost of Roger Casement
Knocking on the door.

Six years after the Easter Rising Ireland was divided. The six northern counties split off and were held under a British control. A majority, or a spokesman for a majority, gave up the six northern counties as the price of their independence. This was an action which the U.S. Senate, had it been a party to the decision and sensitive to its special responsibility for protecting minority political interests, might well have not sanctioned. Under the U.S. Constitution minority interests are protected first in the allocation of two senators to each state, no matter what the population of the state may be, and in the requirement of two-thirds vote of the Senate on vital matters of foreign and domestic policy. The issue of Ireland is not very different from that which was at the heart of the Civil War, the dividing of the country so that the minority might be controlled and kept in slavery. In the Civil War, the substantial issue was race, in Ireland it was—and still is—religion.

Following the suppression of some of the first riots in England by former colonial persons living in England, one Englishman, responding to expressions of shock on the part of some persons over the violence of the suppression observed, "We have brought our cruelty home."

The security of England is not endangered by the present extradition treaty between England and the United States. There is no pressing, practical reason, and no reason of principle, to make it easier to deliver persons seeking political asylum in the United States to the harshness of British Law, and to the judicial procedures in force in Northern Ireland.

For both judicial and political reasons, this supplemental treaty should be rejected by the U.S. Senate.

Senator TRIBLE. Thank you, Senator McCarthy.
Senator Kerry.

Senator KERRY. I do not have any questions. I just want to welcome my good friend and thank him for his comments this morning.

One comment for the record. I believe the editorial in the New York Times—nobody needs to defend the New York Times, but I believe it was prior to the submission of the treaty and the language was not yet clear, nor the manner in which it would be set forth. I believe it was submitted a couple of weeks prior to the language being made public and the treaty actually coming forward.

So I am not sure whether or not that is their current position, or whether it would be relevant, notwithstanding whether it was Monday or not.

Thank you.

Senator McCARTHY. I think the Times suffers. Its writers like some others can write, but they cannot read. [Laughter.]

Senator TRIBLE. Senator Eagleton.

Senator EAGLETON. I take it, Senator McCarthy, that you then would change what has been the settled law for decades and decades and decades, that is the doctrine of noninquiry into the judicial procedures of the receiving nation?

Senator McCARTHY. That is right.

I would make one other point, Senator. The evidence—not making a legal judgment, there is no real evidence that there has been a rash of extraditions, that the law has been loose, that bad people, have been getting away or many of them have been getting away.

Everybody quotes John Kennedy now, even Ronald Reagan. But I was with him at a church service before Vatican Council II and the bishop said, there is no trouble in the church. And John said: If there is not, I do not know why they have a meeting.

And, I think, there is a little bit of that with reference to this extradition matter. It is not going badly, so there is no reason to rush with it especially. As Congressman Hughes said, they have been working seriously on approaching it in what I consider a proper constitutional and traditional way.

Senator EAGLETON. Even Congressman Hughes, who testified before you and staunchly criticized this proposed treaty, supports the doctrine of noninquiry.

Senator McCARTHY. Yes.

Senator EAGLETON. If we change it, then, to the doctrine of inquiry, then no one is extraditable to Northern Ireland, correct, no PIRA accused?

Senator McCARTHY. Probably not.

Senator EAGLETON. In fact, you threw out gratuitously you wonder about even extraditing a PIRA to the Republic of Ireland.

Senator McCARTHY. That is right.

Senator EAGLETON. Now, with respect to foreign policy, I asked this of an earlier witness: Suppose there is, and hopefully there would be, a second Sunnysdale and suppose a power-sharing government hopefully would be established in the North and with it bring some semblance of order. Can a fringe group continue the civil war just ad nauseam, Senator?

Senator McCARTHY. I suppose there are some elements of the opposition group in Ireland who want a united Ireland and I assume

would not be satisfied. But it seems to me their case would be considerably weakened if there was a coalition government in Northern Ireland and if equal rights generally were observed.

It seems to me then the case to be made for extradition in the case of what now passes for political crimes would be, it seems to me, considerably weakened.

Senator EAGLETON. That is all I have.

Senator TRIBLE. Senator Sarbanes.

Senator SARBANES. No.

Senator TRIBLE. Senator Biden.

Senator BIDEN. I have no questions, but it is good to see Senator McCarthy.

Senator MCCARTHY. Good. I do not have any answers left.

Senator TRIBLE. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

I guess I am the only individual serving on the committee who was with Senator McCarthy when he was in the committee sitting at this same bench. I welcome him back.

I have no particular questions. I would just like to make one point, as I understand it. That is, the system as it works now the system cannot be too bad because in the last 40 years we have had an average of about 50 requests a year for extradition, totaling around 2,000 cases, but of that 2,000 cases only 4 cases exist where we refused to return a defendant based on the political crimes.

In addition to that, I am informed in the last 10 years there have been 76 requests from Great Britain and only 2 refusals, plus 2 that are presently on appeal.

So the problem is a real one, and the specific one that we must seek to find some compromise language on to resolve is not one of pressing magnitude. I just want to make that point and again welcome Senator McCarthy here.

Senator TRIBLE. Senator McCarthy, thank you for your presence.

Senator MCCARTHY. Thank you, Mr. Chairman.

Senator DODD. Mr. Chairman.

Senator TRIBLE. I am sorry. Senator Dodd.

Senator DODD. I wanted to welcome Senator McCarthy to the committee as well and thank him for his very lucid, worthwhile testimony. I think he has been, over the years, one of our more quotable figures on the public horizon, and I've always loved his one remark about the Senate—I think it has been attributed to you; you can disassociate yourself from it if you care to.

Senator MCCARTHY. I will see after I hear it.

Senator DODD. It was the remark that the Senate ought to be a place where people of reputation come, not where you come to make a reputation. And certainly, having you back here is a good example of a person of reputation coming back to the Senate. I am delighted to have you here.

Senator MCCARTHY. I am not sure I said it, but I will take credit for it. I am blamed for a lot of things I did not say that were bad, so I will take credit for that.

Senator DODD. I am not going to clean up the record at all. We will just leave it there.

Senator MCCARTHY. All right. Thank you.

Senator DODD. Senator, before you leave, it has been on my mind a long time. I think the most quotable McCarthy quote, the one I like the best, is the one about the blackbirds on the wire. Did you make that quote? Was that yours?

Senator MCCARTHY. Yes; that was really mine, about the press.

Senator BIDEN. What was it?

Senator MCCARTHY. I thought of it again the other day.

Senator BIDEN. Would you enlighten Senator Dodd on the blackbirds?

Senator MCCARTHY. These newer Senators have got to be forewarned. I said that the columnists generally were like blackbirds in the fall. If one landed on a telephone wire, they all lined up right behind him. If one flew away, they all flew away.

This was the cycle of the press. I thought it was rather a good image. That is one of the better things I have said about them over the years. [Laughter.]

Senator BIDEN. Thank you, Senator. [Applause.]

Senator TRIBLE. We will now hear from a panel of legal scholars: Professor Christopher Pyle, Professor Bassiouni, Professor Rice, and Professor—or rather, Arthur Rovine, who is testifying on behalf of the American Bar Association.

Senator DODD. Mr. Chairman, would it make more sense—to just break and begin with this panel at 1:30, rather than getting half-way into it now.

Senator TRIBLE. Senator Dodd, what I was going to suggest is that we hear from the panel, giving each witness 5 minutes in which to summarize their statements, and that would bring us just past the hour of 12:30.

Senator DODD. Have you seen Professor Pyle's statement? [Laughter.]

Senator TRIBLE. Having seen Professor Pyle's statement, I believe it is all the more imperative that we proceed under the procedures that I have suggested.

Senator PELL. Mr. Chairman, I would like to ask also that we give consideration and thought that this day's hearings may not be adequate and that maybe some of us would request another day of hearings. That remains to be seen.

Senator TRIBLE. The record will so reflect the statements of my colleague, Senator Pell.

Gentlemen, I see we have three and not four members of the panel, so that will permit all of you a full 5 minutes to summarize your statements. Your full statements will be made a part of the record, and then we would invite you back at 1:30 this afternoon and my colleagues will then have an opportunity to in greater detail pursue the points that you have raised in your testimony and in your written statements.

Professor Pyle, perhaps we should start with you since you have the most weighty presentation today.

**STATEMENT OF PROF. CHRISTOPHER H. PYLE, MOUNT HOLYOKE
COLLEGE, DEPARTMENT OF POLITICS**

Mr. PYLE. Thank you, Senator.

Senator TRIBLE. Please pull the microphone up so that everyone can hear your testimony.

Mr. PYLE. Having said so much on paper, perhaps I should say very little at this hearing. Indeed, much that I would have said in my oral remarks has already been said very ably by Senator Eagleton and by Congressman Hughes and by Senator DeConcini, in particular. So I can be brief.

Senator Eagleton's questions demonstrated, brilliantly, if I may say so, the complexities of this problem. He went through a set of hypotheticals that I would have enjoyed using in one of my classes. He cut through a tangle of issues and raised the critical moral questions—questions that also demonstrate the enormous complexity of this subject.

I also suggest that he is well along the way to answering these questions, and would perhaps be a good person to help in marking up a treaty or, better yet, legislation.

Senator EAGLETON. Get the mike in on that stuff, Professor. [Laughter.]

Senator DODD. He is not up for reelection either. [Laughter.]

Mr. PYLE. I have just two main points that I would like to make and several subsidiary ones. The first is simply that there are better ways to solve this problem than the one before you. The second point is that the best way to proceed is to quietly shelve this treaty and do what Congressman Hughes suggested: complete a legislative process very well begun.

I have prepared a chart for you that suggests seven different ways to deal with the problem of terrorism and the political crimes exception. I would be happy to answer questions about any of those seven approaches.

I present this chart simply to suggest that the issue is very complicated and that there are better ways to solve it than the way the administration has suggested. Congressman Hughes has suggested an excellent approach, but of the seven approaches to this problem, the administration's is probably the worst.

The administration approach would categorically exclude from the political crimes defense all crimes of violence normally committed by revolutionaries. It would effectively abolish the careful distinction we have drawn for over 140 years between rebels and terrorists.

Now, perhaps we have not dealt effectively enough with the problem of terrorists. Congressman Hughes and his committee, this committee, and the Senate Judiciary Committee have been struggling with this question offhand or for 5 years. If I were to point to a consensus on this, I would say that we are moving toward some version of the "wanton crimes" exception. Yet, with all the doubts that Senator Eagleton has expressed, we have always tried to distinguish between rebels and terrorists. And that is what I suggest you try to do now, and to do so in the context of the four main cases from Northern Ireland.

As I suggest in appendix 3 to my statement. I believe that the McMullen, Mackin and Doherty cases were rightly decided.

McMullen, as you will recall, was the fellow who placed a bomb in a barracks that killed a chairwoman.

Mackin is a fellow who in a scuffle with undercover soldiers was accused of having shot one of the soldiers, although the evidence that he may have shot him is very thin. It is more probable the soldier was shot by one of the other soldiers firing at long range.

In the third case, Doherty was charged with killing a captain in the British Army during an IRA shootout with an Army patrol. As the judge said in this case, that is the classic case of the sort of revolutionary situation for which the political crimes defense was invented.

The fourth case I find more problematic. That is the Quinn case. Mr. Quinn is charged with having prepared and sent letter bombs through the mails. The group with which he conspired is also charged with leaving sachel bombs in pubs and bars and other public places.

It seems to me that Mr. Quinn would be a candidate for the wanton crimes exception to the political crimes defense, because the actions he is charged with constitute deliberate and intentional violence with wanton disregard for the lives of persons not involved in armed conflict.

But what should we do with the killing of Lord Mountbatten? Had Lord Mountbatten been in charge of the Royal Ulster Constabulary, I have no difficulty in saying that anybody who attacked him would be entitled to the political crimes defense, even though I might not approve of the attack or the cause for which the attack was made.

Lord Mountbatten, however, was a retired general on a yacht with some children. If the laws of war applied, he would be considered outside of combat. So, to bomb him on that yacht would, in my judgement, make the bombers vulnerable to extradition under the wanton crimes exception.

For the same reason, it seems to me that the provisional IRA members who blew up the Queen's horse guards who blew up Harrods, and who blew up a military band concert conducted for children and elderly, are prime candidates for the wanton crimes exception.

And yet, I cannot extend my concern with that kind of killing to people who shoot at soldiers, because I remember that Americans also shot at British soldiers, and shot in a kind of "cowardly" fashion, from behind farmhouses and stone walls in my home state.

At some point we have to respect the right to revolution, just as we respect the right of governments to defend themselves, even if those governments are not democracies. And we have to find some way of being neutral if we are to achieve the kind of balance that Senator Tribble is advocating.

It has been suggested that perhaps the wanton crimes exception should be very narrowly drawn to deal only with unauthorized violence. This would mean that if the violence was authorized by the IRA, we would not extradite, but if it was not authorized, like the bombings of the Horse Guards, then we would extradite.

I think that may be wise. It is the approach taken by the Seventh Circuit Court of Appeals in the case of Abu Eain. It gives me great moral conflict, however, because I can imagine cases where I would not want to go along with that, even though I think that it is important politically for revolutionary groups and governments

to take responsibility for the indiscriminate violence of their agents.

The very fact that I am morally disturbed by that choice suggests to me that perhaps the best approach is to rely upon the common law method, and permit a case-by-case development of the law with full awareness of the facts, the sort of thing that Felix Frankfurter, a conservative jurist, but also a civil libertarian, once recommended.

Can our magistrates do it? You have raised that question, Senator Eagleton. I am not sure. Some of them can; some of them cannot. Very few of them know much about extradition law.

But on habeas the accused can get a review by a district judge. If Congressman Hughes' legislation goes through, the Government will also get a review. So I am not sure that is too serious a problem. Or balance, I would rather trust the case-by-case approach.

I say that because I have watched the case-by-case development of what constitutes an uprising. The uprising test has worked rather well for almost a century. It pretty well guarantees that some isolated group like the Weathermen or the Baader-Meinhof Gang, which has no popular support, would not be entitled to that defense.

Under the uprising test, the political crimes defense goes only to members of groups like the IRA, who are well organized, well disciplined, have been around a long time, and have broad popular support, even though, as with our own revolutionaries, that support is not majoritarian support. As John Adams said of our Revolution, one-third of the Americans supported it, one-third opposed it, and the other third did not give a damn. The uprising test does not require majority support, but it does require widespread support. That makes a lot of sense to me.

I will end my comments there, but I will be glad to answer questions.

[The prepared statement of Professor Pyle follows:]

PREPARED STATEMENT OF CHRISTOPHER H. PYLE—EXTRADITION, POLITICAL CRIMES,
AND THE U.K. TREATY.

I appreciate the opportunity to comment on the proposed supplementary treaty of extradition with the United Kingdom.

I am here today as a professor of law and politics who happens to be writing a book on "Extradition, Political Crimes, and American Law." I do not represent any organization or speak on behalf of any client.

At the outset, I wish to apologize for the length of this statement. Given the complexity of this subject, however, I am not sure that it could have been much shorter.

The statement responds to questions raised by the Chief Counsel and Committee staff members. It sets forth some reasons why I oppose this treaty and the approach to extradition it represents. The statement places the treaty in perspective by describing earlier efforts to abolish the political crimes defense and by recalling some of the historical and constitutional considerations that lie behind the defense. It concludes with some suggestions on how the Committee might proceed. Appendix 1 analyzes a similar treaty that the administration tried to conclude with a dictatorship in the Philippines. Appendix 2 considers whether British government in Northern Ireland can be considered democratic or fair, and Appendix 3 analyzes other, and perhaps better, ways to exclude terrorists from protection of the political crimes defense.

I. SOME SPECIFIC OBJECTIONS TO EXTRADITING POLITICAL OFFENDERS TO NORTHERN IRELAND

Since the Fenian rebellions of the 1860s, the United States has never extradited an Irish rebel against British rule. The proposed supplementary treaty would reverse this policy. It would commit the United States to surrendering to the United Kingdom all persons alleged to have fought to end British control over Northern Ireland.

The treaty would do this by effectively abolishing the political crimes defense to extradition for anyone who raised arms against British rule anywhere in the world.¹ In this treaty, abolition is effected by declaring, in effect, that all forms of violence necessary to the conduct of a revolution are terroristic, and therefore not entitled to the protection of the political crimes defense.²

The political crimes defense has been part of Anglo-American extradition practice since the American Civil War, when Britain refused to surrender gunmen for the Southern cause who had sought refuge in Canada. It is a standard provision of nearly 90 treaties of extradition that the United States has concluded with other nations, and is common to the extradition treaties of most western nations.

The defense has survived for more than a century, despite periodic bouts with political assassinations, kidnappings, and bombings, for two reasons. First, western nations have found it prudent not to commit themselves, by treaty, to use their legal systems to help other nations suppress any and all rebellions. Second, they have not wanted to be complicit in "victors' justice," particularly where that complicity would outrage sympathetic nationality groups within their own borders.

The political crimes defense is an appropriate public policy for a nation that defines itself as a nation of immigrants and as a haven for political refugees of all kinds. Its abolition would signal a fundamental realignment of national sympathies away from political refugees and towards the foreign regimes whose policies drove them to violence, and then into exile.

The proposed treaty would not enhance the extradition of terrorists like members of the Provisional Irish Republican Army (PIRA) who bombed Harrod's Department Store, a band concert, and the Queen's ceremonial Horse Guards in London several years ago. These people are already extraditable under the wanton crimes exception to the political crimes defense. Under that exception, a federal court has authorized the extradition to Israel of a Palestinian charged with planting a bomb in a refuse basket in a crowded civilian marketplace.³

The purpose of this treaty is not to facilitate the extradition of wanton killers of innocent bystanders, but to permit the extradition of rebels who have fought as revolutionaries have always fought, but who are labeled as terrorists by the regime they resisted. The British government refuses to admit that there is a rebellion in Northern Ireland. In its view, the PIRA and similar groups are nothing more than organized criminals and terrorists.

By agreeing to do away with the political crimes defense to extradition with the United Kingdom, the Reagan administration seems to have concluded either that (1) there is no rebellion, but only criminal violence, in Northern Ireland, or, (2) there is a rebellion, but none of the rebels should be exempt from extradition because some of them are guilty of committing acts of wanton violence.

Given the number of para-military groups operating in Northern Ireland, the first of these conclusions is simply not sustainable on the facts.⁴ The Justice Department and their British clients have tried in four extradition cases during the past six years to persuade our courts that no rebellion exists in Northern Ireland, and they have failed each time.⁵ The magistrates and judges have consistently ruled that the violence against British rule is sufficiently disciplined and focused, and enjoys sufficient popular support, to constitute a rebellion.⁶

¹ Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed at London on 8 June 1985, Art. 1 (e-1).

² In previous legislation, and in an unsuccessful treaty with the Philippines, abolition was sought by transferring administration of the defense from the courts to the State Department. See section 2 of this statement.

³ *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981).

⁴ See Appendix 2 to this statement.

⁵ The facts of these cases are set forth in Appendix 3 to this statement.

⁶ *In re McMullen*, Magistrate No 3-78-1099 MG at 3 (N.D. Cal. May 11, 1979); *In re Mackin*, 80 Cr. Misc. 1 (S.D.N.Y., August 3, 1981), 668 F. 2d. 122 (2d. Cir. 1981); *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. Oct., 3, 1983), appeal pending, 83-2455 (9th Cir. Oct. 14, 1983); and *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

The second conclusion, that there is a rebellion, but that none of the rebels should be exempt from extradition because some of them are guilty of committing acts of wanton violence, would, if taken seriously, destroy the political crimes defense in virtually all cases, since some participants in every revolution (on both sides) commit acts of terrifying violence.

Besides, extradition is a judicial process that seeks to do individual justice. The proper issue in every case is not what the revolutionary group (or former government) is thought to have done, but what the accused is charged with having done. Guilt by association may not be used to mark a person for extradition any more than it may be used to convict him at trial. Each individual must be judged, for purposes of extradition, on the basis of his conduct, and his conduct only.⁷

The Department of State has argued that there should be no political crimes defense in the extradition law of western democracies.⁸ Implicit in this argument are several assumptions that will not bear close scrutiny.

The first is that countries never change. Therefore it is perfectly acceptable to commit our courts, in perpetuity, to helping certain friendly regimes suppress their rebels by extraditing fugitive rebels back to their police and courts.

The second dubious assumption is that if the government of one of those countries should change for the worse, we can count on the President or the State Department to abrogate the extradition treaty with it. The fact that the United States has never abrogated an extradition treaty because of a decline in the quality of justice, we are told, should not cause us pause; informal suspension does occur when the Departments of State and Justice find quiet ways to torpedo foreign extradition requests. Behind this argument, however, is the intolerable assumption that Americans should entrust the liberty of persons sought for criminal prosecution to politicians rather than to judges.

The third dubious assumption is that Presidents and Secretaries of State can be trusted to decide which foreign regimes our courts should assist in the suppression of revolts. That our President can be given authority by Congress to help other regimes suppress rebellions by supply them with military and economic assistance is beyond question. But Congress has no authority to empower him to order marshals to seize alleged rebels within the United States and give them back to the regimes that want to suppress them. That power was never granted to the President by Congress; it cannot be inferred from his constitutional power to conduct foreign affairs.

When the first extradition requests arose in the 1790s, the courts automatically took jurisdiction. They did not require a specific grant of authority from Congress for what was, to all concerned, so self-evidently a judicial matter.⁹ The legitimacy of these assumptions of authority by the courts was endorsed by Jefferson, Marshall, and Webster, the principal architects of our extradition law and practice. The political crimes defense was added in the 1840s precisely to assure that extradition would not become a mere formalistic process whereby courts rubber-stamp seemingly correct warrants from foreign regimes.

From its beginnings in the 1840s, the political crimes defense was assumed, without question, to be a matter for the courts to decide.¹⁰ Not until 1981 did an administration claim that the courts lacked jurisdiction to grant the defense. That claim was carefully considered and rejected in the *Mackin* case.¹¹

⁷Thus, I believe that Judge Sofaer missed the point when he suggested that the political crimes defense "has never been viewed as creating rights or entitlements for the fugitives themselves." The right to have the alleged criminality of one's conduct judged individually, without the imputation of guilt by association, derives from the due process clauses of the federal Constitution, not from the political crimes defense per se. Similarly, I believe that Judge Sofaer is not correct to portray the political crimes defense as merely "reflect[ing] each sovereign government's foreign policy judgment as to the circumstances under which it will provide sanctuary to political opponents of a given foreign regime." Stenographic Transcript, *U.S.-U.K. Supplementary Extradition Treaty, Treaty Doc. 99-8*, Hearing before the Committee on Foreign Relations, U.S. Senate, August 1, 1985, at 8. That view confuses extradition, which is a judicial process, with political asylum, which is an executive decision. It also presumes that extradition is solely a creature of international law, when, in fact, it is a product of treaties, assertions of inherent judicial authority, and legislation all under the federal Constitution.

⁸Testimony and statement of Abraham D. Sofaer, Id., *passim*, and "U.S.-U.K. Supplemental Extradition Treaty," undated, submitted to the Senate Committee on Foreign Relations courtesy of Thomas Bleha, Legislative Affairs, Department of State, with a typewritten copy of the treaty. See also "Sealing the Terrorist Foxhole," New York Times, editorial, July 11, 1985.

⁹*United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795) (quasi-extradition case involving seamen) and *United States v. Robins*, Fed. Cas. No. 16,175 (1799) (under habeas corpus). Legislation formally giving courts that authority was not enacted until 1848.

¹⁰See section 2 of this statement.

¹¹In *Matter of Mackin*, 80 Cr. Misc. 1, 36-43 (S.D.N.Y. 1981).

Extradition was made a judicial function precisely so that persons under the protection of our laws could not be surrendered to foreign regimes for reasons of state. That is why members of the Senate and House forced the Reagan administration to shelve a proposed treaty with the Philippines that would have effectively abolished the political crimes defense. (For a more extensive discussion of the Philippines treaty, see Appendix 1 to this statement.) Members did not agree with Vice President Bush, who had praised the Marcos regime as "democratic." They knew that if the treaty were ratified, political refugees like the late Senator Benigno Aquino, Jr., would be vulnerable to extradition on trumped-up charges. Indeed, the warrant for Aquino's arrest and extradition had already been prepared on charges that, while in the United States, he had conspired with rebel bombers at home.¹²

A fourth dubious assumption is that the "democratic" nature of governments like that of the United Kingdom justifies the adoption of the treaties that would order our courts to help them suppress their internal revolts. Actually, democracy has little to do with it. The real issue is justice. Extradition is a judicial process whereby our courts decide whether justice will be done by authorizing the delivery of an alleged criminal (alien or American) to another country to stand trial. The political crimes defense guards, in a crude way, against the high likelihood of victors' justice.

It may be argued that the proposed treaty is exceptional because Great Britain is exceptional in its adherence to democracy and justice. There are two responses to this argument. First, the treaty is not just with Great Britain. It is with the United Kingdom of Great Britain and Northern Ireland. Whatever one thinks of the political and legal system of Great Britain, Northern Ireland is not a democracy and has never been known for the quality of its justice, particularly towards alleged rebels. (For a summary of how justice is administered under emergency legislation in Northern Ireland, see Appendix 2 to this statement.)

Second, the treaty is just the first of many that the administration hopes to negotiate until it has destroyed the political crimes defense utterly.¹³ The treaty is before the Senate now only because the administration has failed in recent years to destroy the political crimes defense completely through legislation.

If the political crimes defense is destroyed, courts will have little to do but rubber-stamp seemingly valid warrants. They will consider the authenticity of the warrants, whether they make out a plausible case for extradition under the terms of the treaty, and whether the acts alleged would constitute a crime if committed here. But the key decision regarding the risks of victors' justice would be made by extradition attorneys at the Departments of State and Justice and their political masters.

The administration is urging a prompt and uncritical endorsement of this treaty on the ground that it is urgently needed to combat terrorism. In fact, the treaty would do nothing facilitate the extradition of persons who indiscriminately attack civilian populations; they are already extraditable to those countries with which we have extradition treaties. Nor would it address airplane hijacking; the PIRA has never hijacked an aircraft. If it did, its hijackers would probably be extraditable under the wanton crimes exception to our current treaty with the United Kingdom¹⁴ (and under multi-lateral treaties which both the U.S. and U.K. have signed dealing with the hijacking and sabotage of aircraft and the taking of hostages.)¹⁵ Nor would the treaty address the problem of hostage-taking. The PIRA does not take hostages (i.e. hold captives for trade). If they did, the hostage takers might be extraditable under the "wanton crimes exception."

II. SOME MORE GENERAL OBJECTIONS TO THE TREATY AND THE SCHEME BEHIND IT

The United States (like Great Britain, France, Belgium, the Netherlands, Switzerland, and Canada) has always been a nation of asylum for defeated revolutionaries and former government officials. For the first fifty years of our existence, we re-

¹²It should be noted that the proposed supplemental treaty with the United Kingdom would permit the extradition of an American citizen charged with conspiring with rebel bombers in Northern Ireland, even though the person had never left this country. Article I (ix2).

¹³One such treaty was negotiated with the Philippines in 1981. For background on that treaty, and why it was not submitted to the Senate, see Appendix 1 to this statement.

¹⁴U.S.—U.K. Extradition Treaty, June 8, 1972 (effective January 21, 1977), 28 U.S.T. 227; T.I.A.S. 8468.

¹⁵E.g., Hague Convention on the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, I.C.A.O. Doc. 8920, 22 U.S.T. 1641, T.I.A.S. No. 7192, art. 8 (effective October 14, 1971), Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 25 September 1971, I.C.A.O. Doc. 8966, 24 U.S.T. 564, T.I.A.S. No. 7570, art. 8 (effective January 26, 1973), and the International Convention Against the Taking of Hostages, 18 December, 1979, UN Doc. A/RES/34/146, 17 December 1979 (ratified by the U.S. 30 July 1980).

fused to engage in any extradition (except for an abortive attempt with Britain) because we had no confidence in most foreign legal systems. When we finally did join the international extradition movement in the 1840s and 1850s, we did so on the express condition that political offenders not be surrendered. To assure that they would not be surrendered, we wrote the political crimes defense into our treaties and vested its administration in our independent judiciary.

The architects of our modern law of extradition were men like Thomas Jefferson, John Marshall, and Daniel Webster—brilliant lawyers and shrewd statesmen with extensive experience in foreign relations. On the British side the great champion of the political crimes defense was John Stuart Mill, philosopher and a member of Parliament. These men knew that revolutions are violent, and that great wrongs are committed on both sides of any rebellion. They were not instinctively opposed to all revolutions or instinctively supportive of all ruling elites. They backed some revolts and opposed others, but mostly they strove to stand off, and at least appear neutral. They understood, far better than recent administrations have understood, just how limited the capacity of even the most powerful nations is for effective and constructive intervention in foreign domestic strife.

The dangers of victors' justice

But whatever their stance on foreign affairs, they understood the difference between foreign policy and domestic law enforcement. They did not expect the courts to bless the extradition of political offenders in ignorance of the risks of victors' justice. On the contrary, they kept extradition courts out of foreign affairs by carefully listing the crimes for which extradition would be allowed, and by excluding from their lists (which were very short) crimes like treason and sedition, which were political on their face. They adopted the rule of double criminality—that the alleged acts would be criminal if committed here—to achieve the same purpose. They also refused to list crimes the proof of which would turn on allegations of wrongful intent, because they knew how such allegations could be manufactured. Finally, to avoid the risk of victors' justice, they added the political crimes defense, which has been a standard provision of nearly all our treaties for over a hundred years.

Now comes an administration that wants to undo the work of Jefferson, Marshall, Webster, and Mill, that does not respect the line they drew between foreign policy and law, and that wants, in effect, to surrender persons for reasons of state. We have come a long way from 1793, when Secretary of State Jefferson refused to surrender Citizen Genêt to the "justice" of the French Revolution.¹⁶

Some instructive hypotheticals drawn from history

The administration claims that it only wants to surrender "terrorists," but presents a treaty that would treat all rebels as terrorists. Perhaps it would be helpful to imagine what extradition would have been like had this treaty, and treaties like it, been adopted at the time our nation was founded.

At the start, both Britain and the United States would have been kept busy surrendering French aristocrats to the French Revolution, and French revolutionaries to Napoleon. We would also have surrendered Irishmen who, inspired by our Revolution, sought, in 1798, to establish their own parliamentary republic. Many had used violence that the British thought was excessive.

In 1815, Britain might have felt compelled to extradite Simon Bolivar from Jamaica to Spanish-ruled Venezuela, while the United States would have felt a similar duty to deliver José Miranda, Bolivar's chief theorist. Britain would have been under great pressure to return fugitive slaves from Canada and the Bahamas to stand trial for crimes committed in the course of their escapes. To American slave owners, there was no greater "terrorist" than Nat Turner, leader of a slave rebellion in 1831.

During the 1830s, Britain and the United States might have been asked by France to deliver Louis Napoleon, and Britain and the United States would have been legally obligated to surrender Louis Kossuth, democratic leader of the unsuccessful Hungarian uprising in 1848, to the Hapsburg regime in Austria. In the 1850s, both the U.S. and Britain might have extradited two democratic Italian nationalists, Giuseppe Mazzini and Giuseppe Garibaldi, before they succeeded in founding modern Italy.

At the outset of our Civil War, Britain would have been committed to surrendering Southern sympathizers who fled to Canada, including the raiders of St. Albans, Vermont. Conversely, the United States would have been obligated to deliver Fenian rebels back to the British—men like John Boyle O'Reilly who, after escaping

¹⁶Moore, *Digest*, Vol. IV, 247.

from exile in Australia, became a scholar, poet, and newspaper editor in Boston, and a hero to a future American President, John F. Kennedy. Thomas Francis Meagher would never have led the Irish Brigade at Bull Run, Antietam, Fredericksburg, or Chancellorsville, become a brigadier general, or served as acting governor of Montana. He would have been sent back to Britain along with the other Fenians.

During the late nineteenth century the United States would have been obliged, under a treaty of this sort with Spain, to surrender José Martí, the Cuban revolutionary after whom Radio Martí is named. A few decades later it might have given up Francisco Madero, before he could (with U.S. support) open the Mexican Revolution.

In 1920, the United States would have been called upon to surrender Eamon de Valera, the future Irish prime minister, who was wanted by the British for breaking out of jail. Had we done so, the Constitution of modern Ireland might not have been patterned on our own.

If the proposed treaty with the U.K. had been in force when Israel was fighting for its independence, Golda Meier would not have been free to visit her family in the United States. Like Menachem Begin and Yitzak Shamir, she was a "terrorist" to the British troops she sought to expel. If such an agreement had existed with Greece in the 1940s, Andreas Papandreu might never have gotten his Ph.D. from Harvard. In the 1980s, treaties of this sort would have required us to deliver former Senators Benigno Aquino, Jr., Jovito Salonga, and Raul Manglapus to the Philippines, or Senator Kim Dae Jung to South Korea. Indeed, if treaties of this sort become the norm instead of the exception, then American courts may in the future be called upon to deliver Kurds to Iran or Turkey, *contras* to Nicaragua, and *mujahedeen* to Afghanistan.

Of course, much of this speculation is fanciful, but it is far less fanciful than the assertion that lawyers at the Departments of State and Justice would have known how to decide wisely which of these rebels to shield or surrender. The fact that these individuals enjoyed refuge in Britain and in the United States was due less to the conscious policy of governments than to the barriers that deterred foreign regimes from asking for their surrender.¹⁷ And the most important of these prophylactic safeguards was not the political judgment of the State Department, but the fact that extradition, and the political crimes defense to extradition, was squarely in the hands of the courts.

Taking sides in perpetuity

But suppose the lawyers at State and Justice were all-knowing and always just. Would such treaties make sense as a matter of wise foreign policy?

They certainly made sense to the conservative regimes of Europe during the mid-nineteenth century. Prussia, Russia, France (before 1830), Austria, and Naples all rejected the idea of a political crimes defense to extradition and did their best to help each other to suppress rebellions. During the twentieth century, the Soviet-bloc nations have taken the same course, refusing to adopt the political crimes defense and treating revolts against one member of the bloc as revolts against all members.

One problem with following the Soviet approach is that it commits the courts of the United States to backing Britain not only against her rebels in Northern Ireland, but against her rebels all over the world (including Gibraltar, Monserrat, the Falklands, and Pitcairn Island), now and forever.

Administration supporters say this is not as silly as it sounds, because treaties are easily changed. But are they? The defects that prevented renewal of the Jay Treaty in 1806 were not repaired until 1842. The absence of an express political crimes defense from the Webster-Ashburton Treaty of 1842 was not cured until 1889, and the last revision of our treaty with the United Kingdom in 1972 took four years to complete. And despite their apparent obsolescence, we still haven't gotten rid of our treaties with Poland, Lithuania, Bulgaria, and Albania.

Which system of justice is preferable

But the big issue in extradition is not foreign policy, but justice, and the central question posed by this treaty is not whether we should back some revolutions and oppose others, but whether we should strip our courts of their traditional power to shield former rebels (like Eamon de Valera), former officials (like the Shah of Iran),

¹⁷After losing the *Lynchhaun* case in 1903, the British did not ask the United States for another Irish rebel until 1979.

and American conspirators with foreign rebellions (like General Singlaub¹⁸), from extradition to the regimes they opposed.

The administration says that this is not a fair question. Once the extradition court finds that the foreign regime's legal paperwork is in order, the State Department could still bar surrender on the grounds of potential injustice.

If so, then the question really becomes: Which system of justice is preferable: the current system where both the courts and the State Department have the power to shield political dissidents from foreign injustice, or the proposed system, that would give that power exclusively to the State Department?

My own preference is for the current system. It is not that I do not trust the current Legal Advisor to the State Department. I do. It is his successors—and the political pressures that will be upon them if this scheme invades our extradition law—that I do not trust. I also remember a previous Legal Advisor at the State Department who refused to invoke the political crimes defense (or elementary considerations of due process) to shield a Jew from extradition to Nazi Germany.¹⁹

Judicial decisionmaking is preferable

It has been argued that judges are not competent to decide who should be entitled to the political crimes defense. Why that should be, so long as extradition is seen as a matter of law rather than foreign policy, I cannot understand. In all my research I recall only two cases in which I thought the granting of the political crimes defense was questionable.²⁰ If there is a difference in "competence," perhaps the new Legal Advisor to the State Department can tell us what it is. I, for one, cannot see any difference between his ability to decide request for the political crimes defense as a judge, and his ability to make the same decision as a State Department lawyer.

However, there may be a significant difference in the quality of justice done in the two arenas. The information presented in a public courtroom will have to be relevant to the question of individual justice and nothing else. The information presented in the secrecy of the Legal Advisor's office may include the diplomatic, law enforcement, or military costs of refusing to surrender the accused.²¹ The temptation that awareness of these costs will place on political decision-makers to ignore the risks of injustice will be enormous, and cannot be tolerated.

For example, consider the predicament President Carter would have been in if a treaty like this one had existed with Iran when extradition of the Shah was demanded as an implicit price for the release of 52 Americans held hostage. Consider the predicament President Reagan would have been in if, at the time of the hijacking of the TWA airliner, the government of Lebanon were controlled by Shiites. They might well have conditioned return of the hostages on the extradition of CIA

¹⁸ As chairman of the U.S. Council for World Freedom, retired major general John K. Singlaub has been raising money for the contras fighting to overthrow the government of Nicaragua. Robert Parry, "Group Aiding Contras Holds Tax-Exempt Status," *Washington Post*, August 23, 1985, A2. This assistance could open him to a charge of conspiracy to bomb or shoot Nicaraguans under our treaty with that nation, which was not abrogated during the Somoza dictatorship, and has not been abrogated since the pro-Marxist junta came to power.

¹⁹ Hackworth, *Digest of International Law*, Sec. 339, at 202, sec. 342 at 215-16 (1934), 2 Dept. of State Legal Advisor Ops. 2117. See also *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934).

²⁰ One involved Andrija Artukovic, a former Croatian official charged with war crimes by Communist Yugoslavia. There the judge barred surrender on the ground that the alleged offenses—mass murders—were political in nature. A better ground for refusing extradition (also implied by the court's opinion) was the likelihood that the accused would be treated unjustly on his return. He was a Croatian put in power by the Nazis; his prosecutors were Communist Serbs. The evidence purporting to establish probable cause was also very weak. *Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In any case, the political crimes element of the decision in that case may have been rendered obsolete by judicial development of the "wanton crimes exception" to the political crimes defense. *Eain v. Wilkes*, 641 F. 2d 504 (7th Cir. 1981); *In re Doherty*, 599 f. Supp. 270 (1984). But see also *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. 1983) and the discussion in Appendix 3 to this statement. Another dubious decision occurred in 1903 when an Irishman named James Lynchehaun (with the help of some mob-style demonstrations) persuaded a magistrate in Indianapolis that his involvement in the murder of his landlady was "political," because many tenants were attacking landlords at the time.

²¹ The administration apparently values being able to make this decision in secret, because it vigorously opposed legislation that would have allowed a person found extraditable by the court to have an open hearing within the State Department. The State Department insists that it has sole authority to deny surrender on humanitarian grounds, but there appear to be no formal procedures or criteria for the systematic and equitable making of such decisions. Briefs have been accepted, but hearings are not permitted. At least one Secretary of State has chosen to limit his analysis of the humanitarian question to the facts of the case presented in the record in court, thus assuring nearly complete ignorance of the politics behind the extradition request. Whiteman, *Digest of International Law*, vol. 6, 1027-28 (1963).

agents whom they believe conspired to set off the bomb that killed 80 Shiites earlier this year. Or consider the predicament President Reagan would have been in if the Marcos regime had conditioned favorable terms for our military bases in the Philippines on the extradition of former Senator Benigno Aquino, Jr.

Of course, in cases like these, countervailing political pressures might persuade the President not to give in to such temptations. But that is not the point. The point is that no President ought to be put in such a predicament. So long as the political crimes defense is in the hands of judges, the President has a chance of convincing the demanding foreign regime that surrender is not within his power. Removing the political crimes defense from the courts and giving it to the executive will not combat terrorists; it will tempt them to take hostages and demand exchanges. It will also tempt unscrupulous regimes (including some allies of convenience) to pressure us (e.g. by upping the rent on our military bases) into helping them put down democratic challengers to their rule.

Treaties of this sort would also create some less visible temptations to ignore the risks of injustice. Most political fugitives are not as influential or as well protected politically as the Shah, CIA agents, or even Senator Aquino. They are more like Eamon de Valera, José Martí, or some of Aquino's lesser-known associates. Their right to be shielded from victors' justice might well be devalued by busy extradition attorneys in the Departments of State and Justice who are more interested in recovering wanted American criminals than shielding revolutionaries that the administration-of-the-moment does not like. We must admit that those who conduct the ordinary business of extradition, like those who conduct the ordinary business of law enforcement, often see their work less in terms of doing justice than in processing cases. Indeed, their careers will be evaluated not by the number of times they stand up against the railroading of fugitives, but how well they keep the extradition trains running.

The need for a uniform standard

I also object to the creation of a double standard in the treatment of political refugees. Those who flee here from a rebellion against the United Kingdom would be sent back; those who rebel against other countries would not. The law of extradition ought to be uniform. The proper way to solve this problem, if there is a problem, is by legislation, not sporadic treaties.

This objection cannot be answered by saying that this treaty is meant to be a model for other treaties with other "democratic" countries with "fair legal systems." That would still leave a double standard with respect to all other countries, causing international resentments and leading, eventually, to the sort of pressures that spread our "most favored nation" trade preferences to almost every nation on earth. Imagine, for example, how the Secretary of State would explain to Costa Rica that it is not sufficiently democratic or fair to merit favored-nation status under our laws of extradition. Or, if Costa Rica were granted special membership in this new family of legally fair democracies, imagine how the Secretary would explain not extending the same status to Guatemala.

Moreover, if the President and the Senate were to pursue this approach, treaty-by-treaty, this Committee would have to hold extensive hearings on each treaty to determine which countries qualify as "democratic" and "fair." It would have to start—rather undiplomatically, I am afraid—with the United Kingdom and its administration of Northern Ireland, which, as I explain in Appendix 2 to this statement, does not now satisfy either criterion.

Nor is it better to have decisions of this sort decided by two branches, rather than one, when the two branches are subject to all of the impressionable judgments, diplomatic pressures, partisan loyalties, and distractions common to the politics of the executive branch and Senate. The issue is not how many branches are involved, but how carefully the decisions are made, and how uncorrupted they are by considerations extraneous to the doing of justice.

The military objectives of this treaty

And, let's be realistic. This treaty—and future treaties like it—are not directed at assisting "democratic" governments with "fair" legal systems, as the State Department claims.²² They are directed at helping "our friends and allies"²³ suppress any and all rebellions against their authority.

²²"US-UK Supplemental Extradition Treaty," undated, submitted to the Senate Committee on Foreign Relations courtesy of Thomas Bleha, Legislative Affairs, Department of State, with a typewritten copy of the treaty.

²³From David Lauter, "U.S., Britain Sign New Pact on Fugitives," *National Law Journal*, July 29, 1985, 5, quoting Assistant Attorney General Stephen S. Trott.

The spirit behind this scheme is not the spirit of the liberal democratic governments that created the political crimes defense to extradition; it is the spirit of the authoritarian regimes that opposed it in the nineteenth and twentieth centuries. It is the spirit of Russia, Austria, Prussia, and the Soviet Union, not Great Britain, Belgium, France, and Switzerland.

When asked which countries they wish to extend this treaty to, administration officials have replied informally: our NATO allies and Japan. That would suggest that they are thinking more about promoting military alliances and trade, since not all our NATO allies are democratic countries with fair legal systems. For example, a recent report on Turkey by Amnesty International found that the torture of political detainees there continues to be "widespread and systematic." Indeed, the report said that "very few detainees are not subject to some form of ill-treatment in police stations, security forces' interrogation rooms and detention centres and prisons."²⁴

The military and political purposes behind this treaty are perhaps best seen by examining a similar treaty that the Reagan administration tried to conclude with the Philippines in 1981. The story of that treaty, and the administration's lack of concern for either democracy or fairness there, is told in Appendix 1 to this statement.

Different than the European Convention on Terrorism

In its explanation of the proposed treaty with the United Kingdom, the State Department suggests that the new exceptions to the political crimes defense represent no more than "a practical step in harmony with the 1977 European Convention on the Suppression of Terrorism, which contains similar provisions."²⁵ In one respect this is true, but in other respects it is seriously misleading.

It is true that the 1977 European Convention takes a categorical approach to the problem, excluding certain crimes of violence from ever being considered exempt from extradition under the political crimes defense. However, Judge Sofaer was mistaken when he testified that the "European Convention ... adopted restrictions on the political offense exception nearly identical to those contained in this supplemental treaty."²⁶ That agreement only exempts from the political crimes defense "the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons."²⁷ That language is excessively broad (and some nations, like Ireland, have refused to sign the Convention or have signed with reservations),²⁸ but the proposed treaty with the U.K. is even broader.

The proposed treaty would go on to abolish the political crimes defense in all cases where "the causing of an explosion [is] likely to ... cause serious damage to property," or where the accused is merely charged, like Senator Benigno Aquino, Jr., with conspiracy to cause bombings.²⁹

The addition of a conspiracy provision to the treaty is especially disturbing. There is none in the European Convention; conspiracy provisions are not favored in extradition treaties among western nations generally. The preference has always been for serious crimes, like murder and arson, where wrongful motive can be inferred from evidence that the accused did the wrongful act. Otherwise, there is enormous danger of trumped-up charges, as in the case of Senator Aquino.³⁰ All the requesting State needs to do is coerce or bribe one witness to implicate the exiled politician in a conspiracy and extradition is virtually guaranteed, for there is no right, under law, to have that witness brought before the American court and questioned. The allegation must be accepted at face value.

The conspiracy provision in this treaty also violates the rule of double criminality, for, unlike American courts, British courts do not require proof that an overt act

²⁴"Rights Unit Charges Turkey With Torturing of Prisoners," New York Times, July 24, 1985, A10.

²⁵"U.S.-U.K. Supplemental Extradition Treaty," undated, submitted to the Senate Committee on Foreign Relations courtesy of Thomas Bleha, Legislative Affairs, Department of State, with typewritten copy of the treaty.

²⁶Stenographic Transcript, "U.S.-U.K. Supplementary Extradition Treaty Doc. 99-8," Hearings before the Committee on Foreign Relations, Aug. 1, 1985, at 8.

²⁷E.T.S. No. 90, Art. 1 (e).

²⁸It is not excessively broad if you conceive of the signatory states as members of a common community in which national borders are not of great political or moral significance. However, it is one thing to hope that certain European countries are moving towards a "United States of Europe" and quite another to suggest that we should have our courts side against all rebellions, in any of these countries (and their possessions around the world), now and forever.

²⁹Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed at London on 8 June 1972, art. 1(i)(1) and (2).

³⁰See Appendix 1 to this statement.

was committed pursuant to the conspiracy. Mere uncorroborated testimony about the accused person's intent, supplied by an alleged co-conspirator struggling to win immunity, is sufficient to assure a conviction.^{30a}

The treaty also goes beyond the European Convention in denying the political crimes defense to persons charged with "possession of an explosive substance [with the intent] to endanger life or cause serious damage to property."³¹ By this definition, possession of a firecracker would qualify the accused for extradition, since the definition of "life" is not limited to human life and there is nothing in the treaty or accompanying explanation to suggest an intent to adhere to the standard rule that extradition is supposed to be limited to serious offenses.

Article 1, section (k) of the treaty would commit the United States to extraditing anyone charged with "damaging property . . . with reckless disregard as to whether the life of another would thereby be endangered." Read literally, it would appear to commit U.S. law enforcement resources to helping with the enforcement of British laws against drunk driving, not only in Northern Ireland, but wherever the Union Jack flies. This is not the sort of extradition we have traditionally agreed to, and it certainly is not what the European Convention provides.

The treaty also goes beyond the European Convention in denying the defense to anyone charged with "the possession of a firearm or ammunition [with the intent by] himself or through another person to endanger life."³² Again, failure to define what is meant by "life" violates the ancient rule that extradition will only be allowed for the most serious crimes. Under this provision, even an attempt to possess a firearm or ammunition for self-defense would expose a person to extradition.³³

The vagueness of the intent element in these "possession" provisions is also disturbing. When Thomas Jefferson proposed the listing of serious crimes as a way of avoiding the risks of injustice, he chose crimes (major common law felonies) where guilty intent was inferable from proof that the accused had done an obviously wrongful act. This treaty, however, would allow extradition not only for an alleged conspiracy to bomb, but for acts of innocent possession that can be transformed into criminal acts by the mere allegations of a paid, coerced, or overeager witness. For example, the possession of fertilizer is a presumptively innocent act which can be made criminal by mere allegations that it was "meant" to be used in a bomb.³⁴ Again, extradition for these "intent crimes" is virtually guaranteed, since the defendant has no right to challenge his accuser in the American court.

It should be obvious that these provisions would permit extradition of alleged rebels to the United Kingdom for acts that would not constitute crimes if committed in the United States, and thus would violate the long-established rule of double criminality. But the Committee might not be aware of a peculiarity in the law of evidence in the United Kingdom that also makes the firearms provision violative of our most fundamental notions of what constitutes a fair trial.

As a result of emergency legislation adopted in 1976, the police in Northern Ireland have no obligation in illegal weapons cases to come forward with evidence that a person arrested near an illegal weapon knew it was there and was in possession of it. All the police have to prove is that the defendant and the weapon happened to be in the same place. Then the defendant must persuade the court that he did not know the weapon was there (or that he had a lawful purpose for possessing it.) This reverses the presumption of innocence and invades the right to remain silent contrary not only to Britain's own common law, but to the law of the United States, Canada, and most West European countries. It is "unusual law" adopted precisely to evade the traditional requirements of the common law.³⁵

Thus, if the Senate consents to this treaty, it will have set a precedent for future treaties permitting extradition for trivial offenses, for acts that would not be criminal if committed in the United States, and to legal systems that operate under rules of evidence that violate our most fundamental notions of fairness.

In drawing its broad analogy between this treaty and the European Convention, the administration seemed to suggest that ratification would bring the United States into line with the emerging extradition law of western democracies. That is

^{30a} See P.W.D. Redmond, J.P. Price, and I.N. Stevens, *General Principles of English Law* 338-39 (Stl ed. 1979).

³¹ Id., Art. I(x3).

³² Id., Art. I (x1 and 2).

³³ Id., Art. I (x1). The European Treaty, it should also be noted, only exempts from the defense persons found with automatic firearms.

³⁴ To see how easily these "possession" provisions could be abused in Northern Ireland, read Lord Gifford's report, "Supergrasses: The Use of Accomplice Evidence in Northern Ireland" (London: Cobden Trust, 1984).

³⁵ Emergency Provisions Act, sec. 9, overturning *Regina v. Whelan* [1972] N.I. 153 (C.C.A.).

not true. The administration fails to mention two provisions in the European Convention that make it substantially more enlightened than the proposed treaty.

One of these unmentioned provisions permits the contracting states, at the time they sign the treaty or deposit instruments of ratification, to reserve the right "to refuse extradition in respect of any offence mentioned in Article I [which includes the bombing offences] which it considers to be a political offence" provided that it promises, when making this decision in individual cases, to take due account of three factors: the "collective danger to the life, physical integrity or liberty of persons" or, that the crime "affected persons foreign to the motives behind it," or that "cruel or vicious means have been used" in its commission.³⁶

Thus, instead of taking the categorical route and excluding whole crimes from ever being "political," the European Convention actually gives its signatories a choice. They can exclude a short list of heinous crimes (e.g. bombings, hijackings, sabotage of airliners, killing of diplomats, kidnapping, or hostage-taking) from the political crimes defense, or they can develop a case-by-case wanton crimes exception instead.

The second unmentioned provision allows signatory states to suspend the so-called "rule of non-inquiry" into the capacity of the requesting regime to do justice. It provides that no State need grant extradition if it "has substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."³⁷

For all these reasons, it is seriously misleading to draw an analogy between this treaty and the European Convention. The Europeans are just as divided as we are on how best to protect rebels and still extradite terrorists. What they have not done is to bar virtually all crimes of violence from the political crimes defense, thereby promising to use their courts to help suppress each other's rebellions, now and forever, with no questions asked about the capacity of the requesting regimes to do justice. That is something that only the Soviet bloc countries do at present, and what the proposed treaty would do, if ratified.

III. THE TREATY IN CONTEXT OF RECENT EFFORTS TO ABOLISH THE POLITICAL CRIMES DEFENSE

To be fully understood, the proposed treaty must be examined in the context of recent efforts to do away with the political crimes defense to extradition.

From 1981 through 1984, the Reagan administration took the position that the political crimes defense to extradition should be abolished entirely, or that its administration should be transferred from the courts to the State Department, which is essentially the same thing. It did not propose a limited cutback in that defense; it advocated total elimination of the defense in all extradition proceedings with all countries.

Legislation proposed in 1981 and advanced repeatedly over the next three years made no distinction between democratic and non-democratic regimes, or between fair and unfair legal systems. The courts were to be stripped of authority to grant the defense; the entire process was to be politicized in the Department of State.³⁸

In the course of this legislative effort the administration asserted, as it has in advancing this treaty, that most crimes of violence be treated as ordinary crimes, even if they were committed in the course of, and in furtherance of, an uprising. The theory behind the legislation is simple: all killings by rebels are murders, and all murderers are extraditable.³⁹

³⁶15 Int'l L. Mat.1272, Art.13 (1)(a-c).

³⁷Id., Article 5. Adoption of this safeguard may have been, at least for the British, a necessary *quid pro quo* for denying fugitives the right to claim that certain acts, like bombings, were of a political character. See Extradition, A "Green Paper" presented to Parliament by the Secretary of State for the Home Department, February 1985, HMSO, Cmd.9421, at 12.

³⁸The original bill, drafted by representatives of the Departments of Justice, was S. 1639, 97th Cong., 1st Sess., 127 Cong. Rec. S9955-S9961 (daily ed. Sept. 18, 1981). It was introduced with bipartisan support as a technical measure to codify and reform a body of antiquated law. Once the full implications of the court-stripping plan became known (in part because of protests against a similar treaty with the Marcos dictatorship in the Philippines) support for the bill in the Senate fell away, and revised bill was reintroduced as S. 1940, 97th Cong., 1st Sess., with only one sponsor. The revised bill provided for judicial review of the Secretary's decision denying the political crimes defense.

³⁹Little attention has been paid by the administration to whether all (or some) who kill in defense of the established regime should vulnerable to extradition once that regime has been overthrown, particularly if the new regime is considered a "friend and ally" of the United States.

Congress did not accept that theory. The Senate Committee on Foreign Relations rejected the administrations's court-stripping plan and rewrote the bill to reaffirm the authority of judges to grant the political crimes defense. The Committee agreed that most acts of violence should be treated as ordinary crimes, but recognized that courts must continue to be free to grant the defense in meritorious cases. Thus the Committee's bill would have granted the courts authority to grant the defense in "extraordinary circumstances."⁴⁰

The same legislation was referred to the House Judiciary Committee's Subcommittee on Crimes.⁴¹ Like the Senate Committee on Foreign Relations, this Subcommittee was initially disposed to support the administration's proposal. However, it also came to realize that stripping the courts of jurisdiction was not wise, and that there are times when foreign allegations of seemingly ordinary crimes of violence have, half-hidden behind them, a political history that cries out for retaining the political crimes defense in some form.⁴²

As members of Congress learned more about extradition, the political crimes defense, and their history, the more they came to support its retention. Initially, most supported the administration's bill as a way of "doing something" about terrorism. However, once they learned that the political crimes defense was not an accident of history, but the conscious creation of men like Thomas Jefferson, John Marshall, Daniel Webster, and John Stuart Mill, they grew skeptical, and called for more information. More information led many of them (particular in the House where more hearings were held) to see the political crimes defense not as a pointless loophole in the law, but as a humanitarian safeguard against victors' justice to which exceptions might be written for humanitarian purposes. Thus, while recognizing that the United States has an obligation to respect the right of revolution, they also came to believe that it was not inappropriate to impose some humanitarian limits on how that right might be exercised.

They were not the first to come to this realization. Successive administrations and Senates came to the same conclusion during the late nineteenth and early twentieth centuries when they added *attentat* clauses to many of our treaties.⁴³ Those clauses permitted extradition for attempts to assassinate heads of state, and were the progenitors of the multilateral treaty that now makes an exception to the political crimes defense for persons accused of attacking diplomatically protected persons.⁴⁴

Out of this humanitarian perspective has also come the judge-made *wanton crimes* exception, which preserves the political crimes defense for rebels (and deposed officials), but denies it to terrorists.⁴⁵ Recognizing the wisdom of this approach, the House Committee amended its version of the bill to keep the defense in the courts and to authorize the courts to make exceptions for crimes involving "wanton and indiscriminate violence."⁴⁶

The House Judiciary Committee also came to realize that the traditional judge-made rule of non-inquiry into the capacity of the requesting regime did not make sense any more. It might have made sense when the United States had only a few treaties with countries like Great Britain, Canada, and France, but it was no longer wise when the United States had treaties with nearly 90 countries, including regimes like those that rule Albania, Yugoslavia, Bulgaria, Liberia, and South Africa.

⁴⁰S. 1940, 97th Cong., 2d Sess., sec. 3194 (e)(2), 128 Cong. Rec. S10880 (daily ed. Aug. 19, 1982). What these "extraordinary circumstances" might be was never spelled out for, even within the Committee, one member's freedom fighter could be another member's terrorist. The hard question was passed back to the courts, as it was in the nineteenth century when members of Parliament and Congress could not agree on what constitutes an uprising.

⁴¹H.R. 6046, 97th Cong., 2d Sess. (1982).

⁴²This is particularly true in cases where the accused is a former official or political opponent of a dictator in power, like the late Benigno Aquino, Jr., of the Philippines, or Charles M. Taylor, an opponent of Samuel K. Doe, the former Master Sergeant who overthrew the constitutional government of Liberia in 1980. Like Aquino, the warrant for Taylor's extradition charges him with a seemingly ordinary crime, but the proceedings behind the issuance of that warrant allege (as they did in Aquino's case) the purely political crime of "subversion." Unfortunately, the U.S. magistrate in Boston who heard Taylor's case refused to question the politics behind the dictatorship's request, and the Justice Department continues to press the dictator's demand for extradition. *Taylor v. Roche*, Civil Action No. 85-1314-K, (D.C. Mass. 1985). The case is now being reviewed on habeas corpus.

⁴³Deere, "Political Offenses and the Law and Practice of Extradition," 27 Am. J. Int'l L. 247, 253 (1933).

⁴⁴Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (effective Feb. 20, 1977).

⁴⁵*Eain v. Wilkes*, 641 F. 2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

⁴⁶Sec. 3194(e)(2)(E) of H.R. 3347, 98th Cong., 1st Sess. (1983).

Judges were also coming to this recognition. Several of them had issued warnings that the rule of non-inquiry, like most rules of law, has limits, and that judges cannot forever turn a blind eye to obvious and uncontrovertible evidence of unfair regimes.⁴⁷

In fact, they do look on occasion. The oft-criticized refusal to deliver Andrija Artukovic to Yugoslavia is best understood not as a misapplication of the political crimes defense, but as a realistic appraisal of the capacity of a regime dominated by Serbian Communists to provide justice to a Croatian who collaborated with the Nazis.⁴⁸ The British decision not to surrender dissident seamen to Communist Poland is another obvious example.⁴⁹

The fact that judges occasionally lift the veil of national legitimacy to examine the requesting regime's capacity to do justice does not mean that they automatically rule for the accused. In the *Doherty* case, Judge Sprizzo examined the capacity of British authorities in Northern Ireland to do justice in the case of an alleged PIRA gunman and concluded that a fair trial was possible. Whether he was correct in that judgment is a matter for careful consideration (see appendix 2 to this statement), but the fact is that he made the inquiry and thus applied to a friend and ally a concern for justice previously directed only at Communist regimes.⁵⁰

In recognition that the rule of non-inquiry ought to have limits, the House Judiciary Committee added a provision to its bill that, in effect, recognized the inherent authority of courts to refuse to be complicit in foreign injustice. The amendment provided that a person shall not be extradited if he [or she] "has established by a preponderance of the evidence that [he or she]: (i) is being sought for prosecution or punishment because of [his or her] race, religion, sex, nationality, membership in a particular social group or political opinion; [or] (ii) would, as a result of extradition, be subjected to fundamental unfairness."⁵¹

This modification of the rule of non-inquiry was not something the House Committee invented on its own; it was adapted from the European Convention on the Suppression of Terrorism.⁵² Article 3 of the European Convention on Extradition contains similar language, as does the reciprocal legislation governing extradition among most members of the British Commonwealth, including the United Kingdom.⁵³ Israel has also adopted this principle,⁵⁴ while the Federal Supreme Court of Germany has recognized it as a rule of constitutional law.⁵⁵

⁴⁷See, e.g., *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960). *Matter of Burt*, 737 F.2d 1477 (7th Cir. 1984).

⁴⁸*Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In a remarkable turnabout, the Reagan administration has recently decided that the Communists who rule Yugoslavia can now be expected to do justice in that case, and is representing that government in a new attempt to extradite Artukovic, who is now 85 years old, senile, and suffering from Alzheimer's disease. *Matter of Artukovic*, Case No. CV84-8743-R (B), (C.D. Cal. 1984). According to a Yugoslavian publication translated by Artukovic's son, representatives of the U.S. Department of Justice "proposed that the Yugoslav side submit a new request for the extradition of Artukovic, and...offered specialists from that Ministry to help draw up a new request for extradition, also to help with the selection of evidentiary materials..." Branimir Stanojevic, *Ustaski Ministar Smrti* (Belgrade, 1985), 11-14.

⁴⁹*Regina v. Governor of Brixton Prison ex parte Kolczynski* [1955] 1 Q.B. 540.

⁵⁰*In re Doherty*, 599 F. Supp. 270, 276 (1984).

⁵¹H.R. 3347, 98th Cong., 1st Sess. Oct. 4, 1983.

⁵²Article 5 of that Convention provides: "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that a request for extradition...has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons." European Convention on the Suppression of Terrorism, 15 Int'l Legal Mat. 1272, 1273, opened for signature and ratification Jan. 27, 1977. For European legislation implementing this principle, see Federal Republic of Germany: International Mutual Assistance in Criminal Matters, sec. 12; Sweden: Stat. 668, sec. 7 (1957); Great Britain: 16 Eliz. II ch. 68, Sec. 4(b)(c); and Switzerland: International Mutual Assistance in criminal Matters, art. 2 (1982).

⁵³The U.K.'s Fugitive Offenders Act of 1967, ch. 68, sec. 4(1) is typical of these laws. It provides that "A person shall not be returned under this Act to a designated Commonwealth country...if...the request for his return (though purporting to be made on account of a relevant offense) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or...that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions." See also Samuels, "The English Fugitive Offenders Act, 1967," 18 U. Toronto L.J. 198 (1968). For similar laws, see India: Extradition Act, 1962, India Cen. Acts 34, secs. 29, 31; New Zealand: Fugitive Offenders Act, 1976, N.Z. Stat. 3867; and Australia: Extradition Act, sec. 16, 1966 Austl. Acts.

⁵⁴Extradition Act, sec. 10, 8 Israel Laws 145.

⁵⁵Extradition (Ecuadorian national) Case [1953] Int'l L. Rep. 370.

Thus, the Committee's amendment was consistent with the humanitarian spirit of the political crimes defense and the exceptions to that defense. It was consistent with the constitutional obligation of American courts not to function as the long arm of anyone's injustice, and it followed the lead of most European states and most common law countries.⁵⁶ But it was opposed by administration lawyers who still wanted to strip the courts of all authority to grant the political crimes defense.⁵⁷ At their behest, the Judiciary Committee's bill was rejected in a floor vote.

When the pending treaty was signed in late June of 1985, it appeared that the administration was holding fast to its original plan, but seeking a less knowledgeable forum in the Senate Committee on Foreign Relations. Again citing terrorism, it demanded immediate, uncritical approval of its new, crime-by-crime court-stripping plan.

In the middle of this effort to stampede the Senate, however, Judge Abraham D. Sofaer became Legal Advisor to the Department of State. Judge Sofaer, a distinguished student of diplomatic history, quickly recognized the unsoundness of the administration's position.

His testimony on August 1, while supporting the treaty, accepts the intellectual approach of its critics. Like the Committee on Foreign Relations and the House Judiciary Committee, Judge Sofaer accepts the proposition that the political crimes defense belongs in the courts.⁵⁸ He also views that defense, as its critics do, as a humanitarian rule to which exceptions can be made for humanitarian purposes.⁵⁹

⁵⁶ The amendment was also consistent with the United Nations Convention relating to the Status of Refugees, 28 July 1951, U.N.T.S. No. 2545, Vol. 189, p. 137. Article 33 of that Convention, which the United States has signed, provides, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." It may be argued that adherence by the United States to this Convention imposes a legal obligation on American extradition courts to lift the veil of presumed legitimacy and examine the capacity of the requesting regime to do justice. Similarly, the U.S. Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. 1253, sec 243 (h)(1), provides that the "Attorney General shall not deport or return any alien...to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Similar language was endorsed by the American Bar Association's Committee on World Order Under Law, "Model American Convention on the Prevention and Punishment of Serious Forms of Violence" (Washington: ABA Division of Public Services, 1983), Art. 5.

⁵⁷ The administration does not seem to have any objection to allowing an inquiry into the capacity of the requesting regime to do justice, just so long as the inquiry is carried out by the executive. Thus our recent treaty with Jamaica provides that "Extradition shall also not be granted [by the executive] if (a) it is established that extradition is requested for political purposes; or (b) it is established that the request for extradition, thought purporting to be on account of the extraditable offence, is in fact made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, or political opinions; or (c) the persons sought is by reason of his race, religion, nationality, or political opinions, likely to be denied a fair trial or punished, detained or restricted in his personal liberty for such reasons." *"Extradition Treaty with Jamaica,"* Report of the Committee on Foreign Relations, U.S. Senate, 98th Cong., 2d Sess. (1984) at 2. A similar, though shorter, provision is to be found in our new extradition treaty with Ireland, *"Extradition Treaty with Ireland,"* Report of the Committee on Foreign Relations, U.S. Senate, 98th Cong., 2d Sess. (1984) at 2. Nor does the administration seem to object to the wanton crimes exception, which is to be found, as a judicially cognizable defense, in our new extradition treaty with Italy, *"Extradition Treaty with Italy,"* Report of the Committee on Foreign Relations, U.S. Senate, 98th Cong., 2d Sess. (1984) at 2. Our new treaty with Turkey would seem to suggest that the courts can suspend the rule of non-inquiry and deny extradition if "the request for extradition has, in fact, been made to prosecute or punish the person sought for an offense of a political character or on account of his political opinions." *"Treaty with the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters,"* Report of the Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess. (1979) at 13. A similar, though shorter, provision, is contained in our new treaty with West Germany, *"Extradition Treaty with the Federal Republic of Germany,"* Report of the Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess. (1979). Judicial authority to deny extradition for humanitarian reasons can be deduced from our new treaty with Finland, *"Extradition Treaty with Finland,"* Report of the Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess. (1979) at 9. In accepting such treaty language, recent administrations apparently are relying on a corollary to the judge-made rule of non-inquiry, which is that questions regarding motives of the requesting state or humanitarian grounds for refusing extradition are for the Secretary of State to decide. See, e.g., *Gallina v. Fraser*, 278 F. 2d 77, 78-79 (2d. Cir. 1960), cert. denied, 364 U.S. 851 (1960).

⁵⁸ Statement by Abraham D. Sofaer, Legal Advisor, Department of State, before the Senate Committee on Foreign Relations, August 1, 1985, at 22.

⁵⁹ *Id.* at 12-15.

And, most significantly, he concedes that the administration's prior effort to wipe out the defense in its entirety was overbroad and badly drafted.⁶⁰

This is a welcome departure from past administration policy. If the administration now accepts the theory of extradition propounded by Jefferson, Marshall, Webster, and Mill, then the only issues that need to be debated are when and how exceptions should be made for humanitarian purposes.

As to when, Judge Sofaer suggests when the other regime is politically democratic and legally fair. As to how, he proposes categorical exceptions for virtually all crimes of violence.

So this is where the debate should resume today. Can, or should, the Senate and President set up a dual system of extradition treaties: one for democratic and fair nations, and the other for undemocratic and unfair nations? And, if such a system is set up, should it be done by categorical exceptions for most violent crimes—an approach rejected by this committee three years ago? (For an analysis of alternatives, including the wanton crimes exception and the laws of war approach, see Appendix 3 to this statement.)

IV. SOME HISTORICAL AND CONSTITUTIONAL CONSIDERATIONS

Much of the debate over the political crimes defense in recent years has been based on the assumption that extradition law is a mere creature of treaties, legislation, and judicial decision, unaffected by constitutional limitations. Therefore, anything that the President and the Senate agree on will be legitimate.

I disagree. From my research into the American (as opposed to the international) law of extradition, I believe that the judicialization of extradition, the political crimes defense, and various humanitarian exceptions to that defense are constitutionally required.

Extradition as a judicial process

During the early days of our Republic there was a violent debate as to whether the initial request for extradition should be decided by the executive or by the courts. The Jeffersonians⁶¹ And the Supreme Court⁶² said the courts; John Marshall and the Federalists preferred the executive, but even Marshall agreed that if the executive were to make the initial decision, the writ of habeas corpus would still guarantee judicial review.⁶³

More important than the intellectual debate over this issue was the public outrage that occurred when President Adams, through his Secretary of State, was seen to have pressured a judge (for foreign policy reasons) to favor Britain's demand for the extradition (under the Jay treaty) of Thomas Nash, alias Jonathan Robbins, an alleged mutineer from a British warship who claimed to be an impressed seaman from America. Nash was found extraditable and sent back to the British Navy to be court-martialed, hanged, and gibbeted. The fury provoked by this decision (and a letter by the judge indicating that he may have been influenced by the Presidents plea), so outraged the American public that no more extradition requests were processed under the Jay Treaty, and all extradition stopped until 1842.

The bitterness of that controversy was remembered by Daniel Webster when he negotiated the Webster-Ashburton Treaty in 1842—the first extradition treaty of modern times. It reestablished that the courts should be involved from the outset, and not just when the accused seeks a writ of habeas corpus to challenge an executive decision to surrender.⁶⁴

⁶⁰ Id. at 22.

⁶¹ 10 *Annals of Congress*, *passim* (1800).

⁶² *United States v. Laurence*, 3 U.S. (3 Dall.) 42 (1795).

⁶³ 10 *Annals of Congress* 615 (1800) approving of the lower court's action in *United States v. Robins*, Fed. Cas. No 16,175 (1799).

⁶⁴ Confirmed by the Supreme Court in *In re Kaine*, 55 U.S. (14 How.) 103 (1852). During the 1840s and 1850s, Secretaries of State took the view that if a court authorized the extradition of a person, they were powerless to block it. Not until the 1870s did they decide that they could, in the exercise of the foreign affairs power, refuse to surrender a person found extraditable. In the 1970s the Departments of Justice and State decided to insist that the requesting regimes be represented by Justice Department, rather than private, attorneys. This, in effect, makes the foreign regimes come to the executive first and permits its lawyers to discourage requests and sabotage cases they do not wish to take. It also conveys the unfortunate impression (and partial reality) that the United States government officially supports every request for the extradition it litigates on behalf of a foreign regime. The better practice would be a pass a law requiring that all requests for extradition be screened by the State Department before being litigated by private attorneys retained by the requesting regimes.

The political crimes defense: Its humanitarian origins

With the exception of the short-lived Jay Treaty, the United States refused to enter into any extradition agreements during its first half century as a nation. As Secretary of State Thomas Jefferson explained to Citizen Genêt in 1793 when the French envoy demanded the return of four fugitives charged with plotting against the new French Republic: "The evil of protecting malefactors of every dye is sensibly felt here as in other nations, but until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplice. . . ."⁶⁵

Jefferson's candor was not calculated to please the headstrong Frenchman, but a year later Genêt had reason to appreciate the policy when his own surrender to France for alleged "criminal conduct" was also denied.⁶⁶ Genêt was probably the first beneficiary of what was to become the political crimes defense to extradition.

During these years, the British were as determined as the Americans not to engage in any form of extradition that might permit the surrender of political fugitives. As Jefferson reported to Washington in 1791:⁶⁷ England has no [extradition] convention with any nation, and their laws have given no power to their executive to surrender fugitives of any description; they are, accordingly, constantly refused, and hence England has been the asylum of the Paolis, LaMottes, the Calonnes, in short, of the most atrocious offenders as well as the most innocent victims, who have been able to get there. The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executive to deliver them up.

Then as now, however, the British (like most nations) were inconsistent; their view of asylum tended to run in one direction only. Thus in 1799 Britain demanded and obtained the surrender of Napper Tandy and other participants in the Irish Rebellion of 1798 who had fled to Hamburg.⁶⁸

After the defeat of Napoleon, the conservative regimes of Europe (notably Prussia, Russia, Austria-Hungary, and Naples) fought against the emerging doctrine of political asylum and did their best to coerce smaller states into extraditing political offenders.⁶⁹ The champions of political asylum included Britain, Belgium, France (after 1830), and the United States.

The political crimes defense to extradition was invented by Belgium and France during the 1830s. At first Britain and the United States resisted it, preferring not to enter into extradition agreements at all (out of a justifiable disdain for most foreign legal systems), and then only entering into treaties covering only the most serious offenses which would be obviously criminal in both jurisdictions.

Their first extradition treaty of the nineteenth century was with each other—the Webster-Ashburton Treaty of 1842. It did not contain a political crimes defense, but subsequent debate made it clear that the principle was implicit in the way each nation viewed the agreement⁷⁰ and as each nation dealt with extradition demands.

How far both Britain and the United States have come since those days can be seen in the responses our foreign ministers gave to extradition demands from the Hapsburg regime in Austria. Explaining why Britain would not countenance the surrender of Louis Kossuth, the most celebrated leader of the 1848 Hungarian uprising, Lord Palmerston wrote: "The laws of hospitality, the dictates of humanity, the general feeling of mankind, forbid such surrender; and any independent government which of its own free will were to make such a surrender, would be deservedly and universally stigmatized and dishonored."⁷¹

Similar sentiments were expressed by the American Secretary of State William L. Marcy in response to Austria's demand for another Hungarian refugee, Martin Kosta. Kosta, who had applied for American citizenship, was seized during a visit to Turkey by the crew of an Austrian warship. Learning of the refugee's plight, and

⁶⁵ Jefferson, *Writings* (Ford ed. 1894), VI, 462.

⁶⁶ Moore, *Digest*, Vol. IV, 247.

⁶⁷ Jefferson to Washington, Nov. 7, 1791, *Memori, correspondence, and Miscellanies from the Papers of Thomas Jefferson*, vol. III, 131 (Randolph ed. 1829).

⁶⁸ Napoleon was so furious at that surrender that he broke off diplomatic relations with Hamburg and told its Senate that they had violated "the laws of hospitality in such a way that even the wandering tribes of the desert would blush with shame." Quoted in Reale, *Le Droit D'Asile*, 63 *Recueil des Cours* 547 (1938). But Napoleon was inconsistent too, when he later demanded the surrender of fugitives who had opposed his rule. The British, of course, refused. *Id.* at 546.

⁶⁹ Their role would be assumed, in the twentieth century, by the Soviet bloc nations.

⁷⁰ As Secretary of State Hamilton Fish wrote in 1876, "Public sentiment of both countries made [inclusion of the defense] unnecessary." Quoted in Moore, *Extradition*, Vol. 1, 306.

⁷¹ Correspondence respecting refugees from Hungary within the Turkish dominions, presented to Parliament, Feb. 28, 1851, p. 33.

his status as an incipient American, the captain of a larger American warship in the same anchorage ran out his guns and forced Kosta's release. The rescue was an act of war which violated the sovereignty of both Austria and Turkey, but the United States refused to surrender the former revolutionary. "To surrender political offenders," Marcy wrote the Austrian minister, "is not a duty; but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind."⁷²

The Webster-Ashburton Treaty, as I have suggested, established that extradition was a judicial, not an administrative, process. This was crucial if the United States were to avoid becoming the long arm of foreign injustice, particularly in cases involving political fugitives, or fugitives from foreign military "justice." As Justice John Catron of the Supreme Court subsequently wrote,⁷³ recalling the controversy surrounding the *Robbins* case:

"... a great majority of the people of this country, were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive, and thereby execute the [Jay] treaty himself; and they were still more opposed to the assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in cases of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this, the judicial power has acted in cases of extradition, and all others, independent of executive control.

"That the eventful history of Robbins case had a controlling influence on our distinguished negotiator [Webster], when the treaty of 1842 was made...is, as I suppose, free from doubt. The assumption of power to arrest, imprison, and extrude, on executive warrants, and the employment of a judicial magistrate to act in obedience to the President's commands, where no independence existed, had most materially aided to overthrow the administration of a most distinguished revolutionary patriot [Adams], whose honesty of purpose no fair-minded man at this day doubts. Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest, founded on them, and long imprisonments inflicted under such warrants, and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed."

Webster's treaty was not appreciated by many of his Democratic opponents in Congress, in part because it endangered former rebels against British rule in Ireland who had found refuge in the United States. As Senator Thomas Hart Benton declared during secret Senate debates on the treaty:⁷⁴

"... in the number and insignificance of the offences for which he might be surrendered, there would be no difficulty in reaching any victim that a foreign government chose to pursue. If this article had been in force in the time of the Irish rebellion, and Lord Edward Fitzgerald had escaped to the United States after wounding, as he did, several of the myrmidons who arrested him, he might have been demanded as a fugitive from justice, for the assault with intent to kill; and then tried for treason, and hanged and quartered; and such will be the operation of this article if it continues.

The absence of special protection for political offenders was not assuaged by a special message from President Tyler, who tried to explain that "In the careful and specific enumeration of crimes, the object has been to exclude all political offences, or criminal charges arising from wars or intestine [sic] commotions. Treason, misprison of treason, libels, desertion from military service, and other offences of a similar character are excluded."⁷⁵ But, in 1843, when the Tyler administration concluded its second extradition treaty with liberal France, it made sure that the agreement "shall not be applied in any manner...to any crime or offense of a purely political character."⁷⁶

The political crimes defense as a constitutional requirement

Most of the extradition treaties signed by the United States in succeeding decades included some form of the political crimes defense. Where it was included, it was understood. In 1853, Justice Samuel Nelson of the Supreme Court, riding circuit in

⁷² Quoted in Moore, *Extradition*, vol. 1, 305-06.

⁷³ *In re Kaine*, 55 U.S. (14 How.) 103, 112-13 (1852).

⁷⁴ "Thirty Year's View," Vol. 2, 449 (1866).

⁷⁵ Message of Aug. 11, 1842, 12 Cong. Globe, 27th Cong., 3d Sess. (1843), 4.

⁷⁶ 8 Stat. 572 (1843), Art. V.

New York, ruled that political offenders were shielded from extradition, notwithstanding the lack of a specific treaty clause or statute.⁷⁷

Justice Nelson did not explain why he took this view, but reading his opinion in light of Justice Catron's analysis of the Robbins case it is possible to write the justification for him and to write it in constitutional terms. Decisions involving foreign demands for the extradition of political activists belong in the courts because they involve human liberty. Central to the American concept of liberty is freedom from political persecution for all persons under the protection of our laws and Constitution. This means aliens as well as citizens, because the Fourth Amendment protects the right of "the people" to be free from unreasonable seizures of persons, and the Fifth Amendment guarantees due process to "persons," not just citizens. The First Amendment is written as a sweeping limit on the power of Congress, and therefore also should be interpreted as curbing the power of that body to affect the political freedoms of any person subject to its laws. The United States government has a constitutional obligation under all three Amendments not to be complicit in the political persecutions of foreign legal systems. Thus to hold that the political crimes defense is not integral to extradition (or, as this administration claims, can be taken away from the courts, in part or in whole) is to violate these constitutional obligations and to return to the jurisprudence of the Stuart kings.

The Constitution underlines this obligation by assuring that the privilege of the writ of habeas corpus shall not be suspended, except in times of rebellion or invasion, and then only when the public safety requires it.⁷⁸ The writ of habeas corpus derives from the Habeas Corpus Act of 1679,⁷⁹ which not only protected "persons" from being locked up arbitrarily by the king, but forbade the king to send them out of the country. To prevent just this sort of arbitrary banishment or surrender, the political crimes defense was entrusted to the courts of both Great Britain and the United States. Had it not been placed there by general consensus, the courts might well have ruled that the Constitution placed it there.⁸⁰ Due process, freedom from unreasonable seizures, and protection of political freedom all require it.

Some proponents of the U.K. treaty reject this argument on the ground that it would, if carried to its logical conclusion, bar extradition arrangement with any legal system that does not meet our specific constitutional requirements for protecting individuals from unfair arrests, interrogations, and trials, or from cruel or unusual punishments. Since no legal system does, or really could, reflect ours perfectly, there would be no extradition.

But my argument does not go this far. I only contend that our courts have the inherent authority and constitutional obligation to question whether the requesting regime has what Justice Cardozo meant by "a scheme of ordered liberty."⁸¹ Details may differ, but the pattern as a whole must be fair.⁸²

At present, courts recoil from the challenge of determining whether the requesting regime is likely to be fair to the accused. They still adhere to the so-called "rule of non-inquiry"—a presumption that any country with which the United States has a treaty of extradition must be fair.⁸³ This presumption might have been plausible back at the turn of the twentieth century, when the United States had relatively few extradition treaties and some people believed that there might be something resembling a "family of nations." But no one can believe this now, when we have extradition treaties with nearly 90 regimes.

I would replace this judge-made rule of non-inquiry with an affirmative obligation on the courts to inquire into the capacity of the requesting regime to do justice, when and if the accused presents sufficient evidence to bring the presumption of systemic fairness into doubt. This is what the amended extradition bill in the House of Representatives would have done in 1983, had the administration not called for its defeat. The administration prefers that our courts never question the capacity of any foreign regime to do justice.⁸⁴

⁷⁷ *Ex parte Kaine*, 14 Fed. Cas. 79, 81-82 (C.C.S.D.N.Y. 1853) (No. 7597).

⁷⁸ Art. I, sec. 10.

⁷⁹ 31 Car. II, c. 2, Sec. XI.

⁸⁰ Again, see *United States v. Laurence*, 3 U.S. (3 Dall.) 42 (1975), *In re. Kaine*, 55 U.S. (14 How.) 103 (1852), and *Ex parte Kaine*, 14 Fed. Cas. 79, 81-82 (C.C.S.D.N.Y. 1853) (No. 7597).

⁸¹ *Palko v. Connecticut*, 302 U.S. 319 (1937).

⁸² For indicia of what I would consider an unfair legal system in the extradition context, see Barbara A. Banoff and Christopher H. Pyle, "To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law," 16 J. Int'l L. & Pol. 169, 202-203 (1984).

⁸³ See, e.g., *Glucksman v. Henkel*, 221 U.S. 508, 510 (1910).

⁸⁴ When I first came to study the law of extradition, I believed that replacing the rule of non-inquiry with an affirmative judicial obligation to inquire into the capacity of requesting regimes

Defining who is entitled to the defense

To conclude that some sort of political crimes defense is necessary to protect political fugitives from victors' justice does not resolve the question of who is entitled to the defense.

In the beginning, some effort was made to distinguish between "pure" political offenses such as treason and sedition, and "relative" political offenses such as shooting, and bombing legislatures. The distinction has dominated much academic writing, but was largely silly because both the listing technique and the rule of double criminality effectively prevented surrender for treason and sedition. The distinction quickly dropped out of American treaties, as diplomats and courts recognized that the real problem was deciding where on the spectrum between isolated acts of politically motivated violence and full-scale civil war a line of protection should be drawn.

Treaties have never provided any guidance on this score. The task of definition has been left to the courts, which have tried many versions of the same basic concept—the uprising test. The most distinguished proponent of this test was John Stuart Mill who remarked, in the course of debate in Parliament in 1868: "[I] do not think it impossible to define political offences. [For example,] Any offence committed in the course or in the furtherance of any civil war, insurrection, or political movement. Mill went on to add that his test "... would not include political assassination."⁸⁵

The uprising test became integral to the extradition law of Great Britain and the United States in the 1980s,⁸⁶ and today provides that if the alleged acts were committed in the course of some sort of uprising that goes beyond isolated violence and mere rioting to some sort of contest for power, then the defense is likely to be granted to the persons alleged to have committed it (either on behalf of the uprisers or the government). Anarchistic violence (attacks on all forms of authority) probably does not qualify.⁸⁷ On the other hand, fighting in uniform is not essential either.⁸⁸ Being part of an organized group that is attacking soldiers makes invoking the defense easy,⁸⁹ but the defense has even been granted to an Irishman who killed his landlady because the killing took place in the course of a general uprising of sorts against landlords.⁹⁰

There is little disagreement that participation in a shoot-out between para-military and military units entitles the accused to the defense. The more disciplined the guerrilla units are, the easier it is to see their alleged offenses as political. On the other hand, the more irregular the units, the greater the hesitation to shield them from extradition. A measure of popular support for the group, the existence of "foreign" forces in the role of an army of occupation, and a history of resistance all combine to support a finding that an uprising exists.

Comparing the alleged actions of the accused against the laws of war mandating respect for non-combatants also helps courts to determine that the accused was part of an uprising and did not kill randomly or for revenge.⁹¹

to do justice would make the political crimes defense unnecessary, since all regimes worth revolting against have unjust legal systems. I have since changed my mind.

As crude as the political crimes defense is, it works to bar extradition in cases where the risks of victors' justice run high. It creates an automatic presumption of injustice that does not offend any particular foreign regime because it applies equally to them all. It is something that judges know how to apply because it has been around for a long time, and the inquiry it sometimes requires into whether an uprising exists is no more offensive to foreign regimes than an inquiry into the fairness of their legal systems would be. I would like our law to contain both the political crimes defense and a rule of affirmative inquiry, but I do not wish to have the second without the first.

I should add here that I would not expect judges, after examining evidence of potential injustice, to bar all extradition blindly. No legal system is going to be perfect. Rather I would expect them to allow extradition in many instances only if certain assurances are given, such as trial in ordinary courts, no prolonged interrogations, and no inhumane punishments, if the accused is convicted.

⁸⁵ Quoted in 6 *British Digest of International Law* at col. 2115. The proviso that Mill added to his definition may be deemed the beginning of a series of humanitarian exceptions to the defense culminating in the wanton crimes exception.

⁸⁶ *In re Castioni* [1891] 1 Q.B. 149; *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894).

⁸⁷ *In re Meunier* [1894], 2 Q.B. 415, and *Eain v. Wilkes*, 641 F. 2d 504 (7th Cir. 1981).

⁸⁸ *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

⁸⁹ *Id.* Whether proof of membership in a revolutionary group is essential is currently the subject of some dispute. The magistrate in *Mackin* held that the accused had to prove membership; the judge in *Quinn* rejected that view. *In Matter of Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. 1981); *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. 1983).

⁹⁰ *In re Lynchehaun*, unreported, but noted in Hyde, *International Law*, Vol. 1, 573-74 (1922).

⁹¹ *In re Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984).

Humanitarian exceptions to the political crimes defense

Grafted on to the uprising rule is a series of humanitarian exceptions to the political crimes defense. These arose in the late nineteenth century as the proponents of asylum came to realize that all revolutionaries were not democratic liberals, and that terrifying urban violence—particularly with the new dynamite—had to be addressed.

One of the first exceptions to the defense written into some laws and treaties was for persons alleged to have assassinated, or attempted to assassinate, heads of state. As a matter of self-defense, and as a means of protecting the families of high officials, our government has agreed, in many bilateral and in one multilateral treaty, to extradite such attackers, even though they would otherwise qualify for the political crimes defense.⁹²

Some European and United States extradition treaties specifically permit extradition if the political motive behind the alleged offense is anarchistic. An exception for anarchistic violence may also be read into the defense by the courts.⁹³ Other treaties have allowed extradition for political crimes of "odious barbarity" or "special cruelty."⁹⁴ More recent exceptions include the "wanton crimes" rule of *Eain v. Wilkes*⁹⁵ and multilateral conventions against the sabotage of civil aircraft⁹⁶ and airplane hijacking.⁹⁷

At the moment, extradition law is moving on two separate lines, both designed to deal with terrorism. The first line, represented by the "wanton crimes exception" of the American courts,⁹⁸ attempts to distinguish between rebels and terrorists. The second, represented in its most extreme form by the proposed treaty, makes no such distinction, but assumes that violent revolt against either of the contracting states is illegitimate under all circumstances and for all time.

The first line of development, as I have suggested, is consistent with nearly two hundred years of law and practice and with the ideals of liberal, democratic republics. The second is consistent with the traditions of the authoritarian states of the nineteenth century and the Communist states of the twentieth.

V. SOME SUGGESTIONS FOR COMMITTEE ACTION

Fundamentally, that is the choice now before this Committee. Within which tradition do we want our law of extradition to remain? One that focuses on the conduct of individuals and grants asylum from victors' justice, or one that permits the surrender of individuals based on sweeping presumptions that their alleged acts of violence could never be justified?

This is not a choice that should be made in haste. Those who would reject the cumulative judgments of Jefferson, Marshall, Webster, and Mill ought to be invited to explain, at some length, why those judgments—which have survived repeated outbreaks of terrorism—should now be swept aside. And members of Congress who expect to decide this issue should devote as much attention to it as our forefathers did.

The administration says America cannot wait; Irish rebels are on the loose. But they were on the loose in 1840s, when both Britain and the United States adopted the political crimes defense. The Fenians were bombing London in the 1860s, when Parliament took four years to debate the meaning of the political crimes defense, and then granted it to them. They were bombing London again in the 1880s, when the British agreed to insert the political crimes defense in its extradition treaty with the United States, thus guaranteeing that Irish rebels would find refuge here. And they will probably be bombing London when we address this issue in the twenty-first century.

The administration says that it wants fast action on this treaty so that it can get on with others to combat terrorism around the globe. But what they call terrorism

⁹²In bilateral treaties this exception is known as the *attentat* (for attempt) clause. The multilateral treaty permitting the return of political assassins is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (effective Feb. 20, 1977).

⁹³See, e.g. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981).

⁹⁴Deere, "Political Offenses in the Law and Practice of Extradition," 27 Am. J. Int'l Law 247, 253 (1933).

⁹⁵641 F.2d 504 (7th Cir. 1981).

⁹⁶Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (effective Jan. 26, 1973).

⁹⁷Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

⁹⁸See also *McGlinchey v. Wren* [1983] 3 Irish Law Reports Monthly 169.

was common in the nineteenth century too. Between 1854 and 1911, nineteen heads of state were assassinated. These killings, the atrocities of the Paris Commune in 1879, and the frequent bombings by anarchists, nihilists, and socialists do not seem qualitatively different than the diplomatic assassinations and bombings of our time. Aircraft hijacking may seem different, but it is comparable in many ways to the hostage-taking of the "pirates" of the early nineteenth century.

So this Committee should take the time to see if there is something new in international terrorism that requires doing away with the ancient safeguards. Are the General Ezetas of yesteryear different than the General Sonozas of yesterday or the Commander Zeros of tomorrow? Is the urban guerrilla violence in Belfast or Jerusalem today different from the Fenian violence of the 1880s, or the killings of the Irgun and Stern Gangs of the 1940s? Is PLO violence much different from the actions of the EOKA in Cyprus, the FLN in Algeria, or the French Resistance in World War II?

Or is there a difference between all of these leaders and groups, who have enjoyed considerable popular support, and angry, isolated groupuscles like the Red Brigades in Italy, the Baader Meinhof Gang in West Germany, or the Weathermen Faction in the United States? And if there is a difference here, is the current law of extradition, which contains the uprising test and the wanton crimes exception, inadequate to deal with them?

Finally, is the problem of state-sponsored terrorism one that abolition of the political crimes defense would solve? Do we have (or want to have) extradition treaties with Lebanon, Libya, or Iran? Do we really want to revise and reactivate our treaty with Nicaragua⁹⁹ while the contras are still operating? Would the proliferation of treaties of this sort really deal with the Islamic Jihad, Libyan assassination squads, Salvadorian death squads, Chilean assassination teams, or Nicaraguan "terrorists"? And does our administration really want to abolish the political crimes defense outright, if it would expose former clients of the CIA to extradition under a subsequent administration?

These are complicated and subtle questions, involving considerations of justice and foreign policy. They cannot be resolved quickly.

Nor can they be resolved simply by focusing on the nature, scope, or popularity of uprisings, because there are some instances in which we may wish to shield politically motivated persons who committed acts of violence without being part of a collective uprising. For example, we may wish to protect from extradition a person unjustly imprisoned in some foreign Devil's Island who, in the course of his escape, kills a guard or even hijacks a plane or boat.¹⁰⁰

Congress may also wish to expand the protections accorded to persons who, even though they were not part of an uprising, may be sought for extradition, or may be unjustly treated on their return, because of their race, religion, nationality or political opinions. It may wish to remind the courts of their inherent and constitutional power to suspend the so-called "rule of non-inquiry" into the capacity of the requesting regime to do justice, and urge the courts to give more thought to conditioning extradition of political fugitives not entitled to the political crimes defense on the requesting regime's promise to avoid certain unusual and unjust practices in interrogation, trial, and imprisonment.¹⁰¹

Whatever policy route Congress chooses to take, it should be clear that this is a matter not only for the Senate Committee on Foreign Relations, but for the Judiciary Committees (and the House Committee on Foreign Affairs). Indeed, since considerations of individual justice are so central to the law of extradition, the Judiciary Committees should probably play a central role.

The wisest route for this Committee to follow is the one that its members (and other members of Congress) followed in 1982, when they persuaded the State Department to withdraw the proposed treaty with the Philippines and allow the debate to focus on broad legislation that all committees could analyze.

However, if legislative action is to focus on this treaty as a prototype for other treaties, then now is the time to do a full legislative analysis—not when those trea-

⁹⁹March 1, 1905, 35 Stat. 1869, T.S. 462 (effective July 14, 1907).

¹⁰⁰See, e.g., *Regina v. Governor of Brixton Prison, Ex parte Kolczynski* [1955] 2 Q.B. 540 (political crimes defense stretched to shield Polish seamen who seized fishing trawler to prevent being returned home and punished for dissenting political views expressed while at sea).

¹⁰¹Some say that such conditions would impose our Constitution on other regimes. In fact, all the courts would be saying is what the State Department says when it sets conditions—that we are not free, because of our constitutional and moral commitments, to use our power to effect extradition unless it is fairly certain that our legal processes will not be used as the long arms of foreign injustice.

ties come forward for the Senate's consent. The issues are the same. They should be examined together, in the light of common reason, rather than in the heat of international and ethnic politics.

If the treaty-by-treaty approach is to be followed, then the administration should be asked to present a list of the countries it plans to approach and explain now why it thinks they are "democratic," have "fair legal systems," and should be assisted by our courts in the suppression of their rebels now, and forever. Representatives of responsible nationality groups should be invited to testify too, since their perspective may be different and their knowledge of foreign injustice more intimate. Organizations and scholars who make it their business to analyze the administration of justice and the preservation of civil liberties in foreign lands ought to be consulted too.

Throughout the investigation, however, the fundamental issue should never be framed in terms like: Do we want to "help" the British or "hurt" the Irish? The core question always should be: How do we facilitate the extradition of persons charged with serious crimes without being complicit in foreign injustice and forced, unnecessarily, to take sides in foreign disputes?

If that cannot be done, then it would be better to do nothing.

APPENDIX 1. THE PHILIPPINES TREATY: A CASE STUDY

In describing the U.K. treaty, Assistant Attorney General Stephen S. Trott stated that it is the "kind of agreement that we are going to try to pursue with every one of our friends and allies. . . ."¹ If so, then a look back at an earlier attempt to help a "friend and ally" may prove instructive.

Citing the threat of Communist subversion, President Ferdinand E. Marcos ruled the Philippines under martial law from 1972 to 1981. During this period, censorship was imposed on the press, the justices of the once-independent Supreme Court and lesser courts were stripped of their tenure in office, and the Commission on Elections was subordinated to the President. All units of the government, as well as educational and other private institutions, found themselves infiltrated by government informants.²

During that period, according to the International League for Human Rights, more than 60,000 persons were arrested and detained on suspicion of subversive activity.³ Those jailed included prominent members of the Philippines intelligentsia and professional groups, and Senator Benigno Aquino, Jr., Marcos's chief opponent in that country's last free elections.

According to Amnesty International, many of those jailed were brutalized or tortured by their interrogators. Those who were not abused tended, almost without exception, to be women or persons with influential friends among the President's supporters or the police. None of the 107 prisoners interviewed by the Amnesty mission, including 71 who said that they had been tortured, had been convicted of any crime.⁴

Early in 1981, President Marcos announced that he was ending martial law in his country, but would retain the powers that he had assumed under a series of martial law edicts. Central among these was the continued suspension of the privilege of the writ of habeas corpus for "all persons at present detained as well as others who may hereafter be similarly detained for the crimes of insurrection or rebellion, subversion, conspiracy or proposal to commit such crimes and for all other crimes and offenses committed by them in furtherance . . . thereof. . . ."⁵ He also announced a new presidential election.

Following those announcements, Marcos's wife, Imelda, came to New York, and met with President Reagan and Vice President Bush in the Waldorf Astoria. Then (at her request) she spoke with Benigno Aquino, Jr., leader-in-exile of the moderate opposition to her husband. She accused Aquino of sending assassination teams to Manila to kill some of her people, but expressed confidence that the Reagan administration would go after him and his associates.

¹Quoted by David Lauther, "U.S., Britain Sign New Pact on Fugitives," *National Law Journal*, July 29, 1985, 5.

²"Philippine Prospects After Martial Law," *Foreign Affairs*, Vol. 59 (1980-1981), p. 1155.

³Hearings before the Subcommittee on Asian and Pacific Affairs and International Organizations, Committee on Foreign Affairs, U.S. House of Representatives, 96th Cong., 2d Sess. (1980), pp. 40-43.

⁴Report of an Amnesty International Mission to the Republic of the Philippines, 22 November-5 December 1975 (London: Amnesty International, 1976).

⁵Proclamation No. 2045, January 17, 1981.

The election was boycotted by all branches of the opposition, but soldiers went into villages throughout the country in an effort to force out the vote for unknown candidates designated by Marcos. In some villages soldiers reportedly decapitated persons as a warning to the boycotters.

Despite this evidence that the Marcos regime was neither "democratic" nor "fair," Secretary of State Haig went to Manila on June 18, 1981, with a personal letter from President Reagan to President Marcos. It reportedly pledged to help the government of the Philippines fight terrorism, possibly by prosecuting U.S.-based Filipino rebels. During that visit, Marcos announced to the press that the Philippines and the United States were in the final stages of negotiations for an extradition treaty—a treaty that subsequently proposed transferring administration of the political crimes defense from the judiciary to the State Department.

At a luncheon in Manila on June 30, 1981, Vice President Bush toasted the dictator who had systematically and brutally dismantled democratic government in the Philippines: "We stand with the Philippines. . . . We stand with you, sir. We love your adherence to democratic principles and to democratic processes, and we will not leave you in isolation."⁶

A few months later, the administration told members of Congress that the proposed extradition treaty was made possible because martial law had been ended and the military tribunals largely phased out. No mention was made of the decrees that authorized the continuation of arbitrary rule or the continued suspension of the privilege of the writ of habeas corpus. The administration said that "The Philippine government agreed in the treaty that extradited persons shall not be tried by extraordinary or ad hoc tribunals,"⁷ but made no mention of the fact that Marcos made all Philippine judges dependent on his patronage.

The explanation went on to say that "The treaty contains provisions which make political...offenses non-extraditable," but failed to mention that it would have transferred administration of this defense from the courts to the State Department.

Instead, the explanation to Congress attacked news media in the Philippines and the United States for suggesting that the treaty might be used to extradite political offenders or facilitate politically motivated requests for extradition. It added: "We have no reason to believe that the Philippine government would jeopardize the treaty by making improper extradition requests."⁸

As the treaty was being negotiated, however, FBI agents acting on the behest of the Marcos regime questioned leaders of the moderate opposition in exile in the United States about alleged connections with bombings in the Philippines. A grand jury investigation into "terrorist" activities by Philippine exiles in the United States was opened in Los Angeles. The purpose of these investigations, apparently, was to assist the Marcos regime in prosecuting persons responsible for a series of anti-government bombings in the Philippines. Among those persons investigated by the FBI was former Senator Aquino.

When the treaty was finally signed on November 27, 1981, it became clear that the administration proposed transferring administration of the political crimes defense from the courts to the State Department. Many nationality organizations and human rights groups protested to Congress.

Their protests became more intense when word was received that the Marcos regime had obtained warrants for the arrest of 40 persons charged with various "subversive" and "seditious" acts and a series of bombings. Among those charged with conspiracy to bomb (apparently while a fellow in International Affairs at Harvard University) was Senator Aquino. The charges against Aquino and the others were based primarily on allegations by Victor Burns Lovely, who, once he got free of the Philippine police, recanted many of his allegations, claiming that they had been obtained by torture.

By March 1982 it was clear to the Reagan administration that the Philippine treaty was in trouble, and that its defeat could destroy the larger campaign to do away with the political crimes defense. Accordingly, the State Department decided to withhold formal submission to the Senate. The official explanation was that the treaty was being withheld out of deference to more extensive consideration of a comprehensive extradition bill that had been submitted to Congress in September

⁶Quoted in Fred Poole and Max Vanzi, "Revolution in the Philippines" (New York: McGraw-Hill, 1984), p. 63.

⁷ The proposed treaty with the United Kingdom does not contain this safeguard.

⁸ "Foreign Policy Aspects of the U.S.-Philippines Extradition Treaty," undated, reprinted in Extradition Reform Act of 1981. Hearings before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, 97th Cong., 2d Sess. (1982), 346-47.

1981.⁹ That bill would have stripped the courts of jurisdiction to grant the political crimes defense, not just in cases involving requests from the Philippines, but in all cases arising out of the 88 extradition treaties then in force.¹⁰

Despite this controversy over the extradition treaty, administration officials did not cease their praise of the "democratic" nature of the Philippine government. When President Reagan greeted Marcos at the White House on September 15, 1982, he spoke of a "shared history and common ideals" and praised the dictator as "a voice for reason and moderation."¹¹

There was no discussion that day of human rights, although Marcos had just completed another crackdown on his political opposition. This time his police carried out mass arrests against the leaders of the labor movement that he had destroyed during the years of martial law. Marcos also sent 1,000 plainclothes "marshals" into the streets of Manila with order to shoot criminal suspects on sight, and to shoot to kill. Within days, forty-eight men and women were killed by the marshals. Half had no criminal records. Elsewhere suspected political opponents simply vanished without a trace.¹²

The U.S. Ambassador to the Philippines at this time was Michael H. Armacost—the same Michael H. Armacost who, as Undersecretary of State, signed the supplementary U.K. treaty now before this Committee. His tour in Manila was not distinguished by any public concern for violations of human rights and democratic procedures, and nothing he may have reported in private deterred Secretary of State George Shultz from praising the commitment of the Philippines to "democracy" when he visited Manila in 1983.¹³

Two months later Benigno Aquino decided not to wait for extradition, but to confront Ferdinand Marcos as a free man. That meeting never took place. When Aquino's plane landed, security guards hustled him out the door and to his death.

From this brief history it would appear that the Reagan administration does not wish to limit its evisceration of the political crimes defense to treaties with democracies whose legal systems are fair. Rather, it would seem to believe that if a regime assists the United States military and opposes "communism," it can be called "democratic" and "fair," and that all rebels against that regime must be "terrorists" for whom no political crimes defense to extradition ought to be allowed. If this is true, then we can expect that this administration would have no difficulty negotiating similar treaties with countries like Turkey, El Salvador, Panama, South Korea, and South Africa.

On the other hand, Judge Sofaer's testimony suggests that the administration's policy may be changing. If so, any redirection of that policy should be evident in the extradition treaty now being negotiated with South Korea.¹⁴ South Korea, like the Philippines, is a dictatorship that uses its criminal law to harass and suppress non-violent political opponents, and subjects political activists to abusive forms of interrogation. It is also a strategic ally that may be tempted to demand American judicial assistance in the suppression of its political opponents. In short, the South Korean treaty may provide a good test of the viability of Judge Sofaer's double standard for the extradition of political offenders.

APPENDIX 2. THE ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

The Legal Advisor to the Department of State testified that the United Kingdom is an "ideal nation . . . from a moral and political point of view" to begin the process of exempting "stable democracies" with fair legal systems from the restrictions of the political crimes defense.¹ If so, then it is appropriate to inquire into the U.K.'s capacity to do justice in Northern Ireland.

The facts are not encouraging. Northern Ireland is not Great Britain. Its politics have never been democratic; its legal system has no heritage of respect for political dissent, equality of rights, or due process in the interrogation, prosecution, and punishment of persons alleged to have committed crimes for political purposes. North-

⁹ Extradition Reform Act of 1981. Hearings before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, 97th Cong., 2d Sess. (1982), 345.

¹⁰ Extradition Act of 1981. Hearing before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess. (1981), 297-313, 303.

¹¹ Poole and Vanzi, "Revolution in the Philippines" at 72.

¹² *Id.* at 69.

¹³ *Id.* at 75.

¹⁴ "Talks on extradition pact with U.S. soon to begin," *The Korean Herald*, June 26, 1985, 1.

¹ Stenographic Transcript, "U.S.-U.K. Supplementary Extradition Treaty Doc. 99-8," Hearings before the Committee on Foreign Relations, U.S. Senate, Aug. 1, 1985, 11-12.

ern Ireland has, since its inception in 1922, been a police-run statelet within the United Kingdom.

Almost from its inception, Northern Ireland has been governed under one species of emergency rule or another. The pattern was set by the Civil Authorities (Special Powers) Act (Northern Ireland) 1922-23 and the various regulations issued pursuant to that Act. Section 1 of the Act empowered the Minister for Home Affairs (or any officer of the Royal Ulster Constabulary authorized by him) to "take all steps and issue all orders as may be necessary for preserving the peace and maintaining order." So sweeping was this provision alone that when John Vorster was Minister for Justice in South Africa he declared that he "would willingly exchange all the legislation of that sort [enacted by South Africa] for [that] one clause in the Northern Ireland Special Powers Act."²

Other sections of the Act and Regulations provided for internment without trial; arbitrary curfews; arrest without a warrant for up to 48 hours solely for the purpose of interrogation (no suspicion or judicial supervision required); searches without warrants by both the army and the RUC of any home believed to be used for illegal purposes; power to disperse any gathering of three or more persons if, in the opinion of a senior officer of the RUC, the group might cause a breach of the peace; power to ban named persons from all but a tiny part of Northern Ireland; power to prohibit the publication of any printed matter; power to prohibit the holding of inquests; and power to outlaw various associations.

This draconian legislation remained in force until 1972. During that time, it was enforced primarily against the Catholic minority, and, within that minority, against those who demanded withdrawal of British rule. Its provisions were not repealed after the protests of the late 1960s and early 1970s, but were revitalized by what are now the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) and the Northern Ireland (Emergency Provisions) Act 1978 (EPA).

No political system that concentrates power this absolutely can be deemed democratic, but even had this legislation not existed, the government of Northern Ireland would have been arbitrary because effective political and economic power was in the hands of a Protestant majority intensely hostile to a Catholic minority. For example, when universal suffrage was finally adopted by the British government in 1946, the Stormont government in Belfast not only confirmed an already restricted franchise but took the vote away from 10,000 (mostly Catholic) citizens who were mere lodgers and not ratepayers. Gerrymandering assured that Catholics would not enjoy fair political representation. Discrimination in employment and housing reenforced these inequities, which eventually spawned the civil rights movement of the late 1960s. The Catholic civil rights movement adopted the non-violent tactics of the Rev. Martin Luther King, modeling their Belfast to Derry march on his Selma-to-Montgomery protest, and singing "We Shall Overcome." In significant respects, they saw themselves as "blacks in white faces."³

Unfortunately, neither the Protestant-run Stormont government, nor the British Army, was successful at protecting the protesters or nurturing a tradition of non-violent political protest. The Catholic ghettos of Belfast were set upon by armed Loyalists, killing a dozen Catholics and burning hundreds of homes. Then, on January 30, 1972, British troops fired on a demonstration in Derry, killing 13 unarmed protesters. The confrontation became known as "Bloody Sunday," and thereafter support for non-violent protest dwindled, and support for armed rebellion burgeoned.⁴

It is difficult for Americans, who so admire the British common law and British manners, to understand that what are in the U.S. deemed fundamental constitutional rights of religious and political minorities are in Britain and Northern Ireland mere "principles of political morality depending for their efficacy, upon the degree of sacrosanctity attached to them by legislators and administrators and the public at large."⁵

² Quoted in Michael Farrell, "Northern Ireland: The Orange State" (London: Pluto Press, 1976), p. 93.

³ Michael Farrell, "The Political Odyssey of the Nationalist Minority in Northern Ireland," unpublished paper presented at Rutgers University, 1985, p. 1.

⁴ One need not believe that expulsion of British rule would be the best solution to the present troubles in Northern Ireland (or that the PIRA would provide a better alternative) in order to concede that the abuses Irish Catholics have experienced at the hands of the British Protestants and government over the past three centuries (or in the past two decades, for that matter) are many times more severe than those that provoked the American colonists to take up arms.

⁵ Harry Calvert, "Constitutional Law in Northern Ireland" (Stevens & Sons and Northern Ireland Legal Quarterly, 1968), pp. 279-80.

We like to think that the British were as much influenced during the seventeenth and eighteenth centuries by political liberalism as we were. Unfortunately, that is not the case. The patron saint of British political theory is not John Locke, but Thomas Hobbes, and modern Britain is closer today to the statism of France than it is to the limited government tradition of the United States. Power has always been more concentrated in Britain than in the United States, and rights have traditionally been regarded more as transient "privileges and immunities" bestowed by a benevolent monarchy or Parliament than as fundamental moral rights beyond lawful revocation.

In the United Kingdom, rights have not been considered to be morally prior to the allocation of authority to government officials, because the British have never accepted the doctrine of popular sovereignty. For them, the "Crown" is sovereign, not the people. Before the revolution of 1688 the Crown meant the king or queen; after that revolution it meant the king or queen under the political control of Parliament's leaders. What Parliament enacts, the Queen signs; what Parliament legislates determines the full scope of individual rights. Any right created by legislation (or the common law) can be abolished by legislation.

In America, as Madison once said, liberty created power, but in the United Kingdom, power has always determined liberty. The difference is profound, but it is not appreciated by most Americans who are brought up to think of the British system as very much like their own. In fact, and in theory, that system is much more authoritarian.

Americans are brought up to revere the common law of Great Britain as the fountainhead of political liberty, and in significant respects it was.⁶ But that was two centuries ago, before the British political system became one of alternating oligarchies competing for the power to dictate the content of legislation (acceptable to the civil service) until such time as loss of public confidence in the policies of their ministers transfers power to the opposition party.

Some people call this democratic, but it is a far cry from the pluralistic, legalistic, and predominately diologic system of government that Americans know. In America compromise, accommodation, and toleration across parties and groups are essential for the enactment of most legislation. In the United Kingdom coalition-building need go on only within parties and the groups that support them. Once a party (or coalition) wins a majority of seats in Parliament, minorities are easily put off or ignored. Whatever the ruling party's ministers propose will normally be passed, modified only to the extent necessary to maintain majority support within the electorate. Thus almost all the political and civil liberties that Americans take for granted are less well developed and more fragile in the United Kingdom.

Nowhere is that lack of development and fragility more pronounced than in Northern Ireland which has been run (with one brief interruption) directly from London since 1972. Various local groups may have influence, but authority is centralized in the Secretary for Northern Ireland. The six counties under his control are not, by the wildest stretch of the imagination, democratic. A more accurate characterization, voiced to me by an American official sympathetic to the British, is "police-run statelet."

When the reins of government were returned to Westminster, there was considerable hope within the Catholic community that British standards of liberty and justice would be imposed on the Protestant power structure. Improvements have been made in equalizing employment and housing opportunities, but these advances have been overshadowed by persistent injustice in law enforcement.

To placate a heavily-armed Protestant majority, which in the early 1970s demanded harsh repression of the rebellious Catholic minority, the British government renamed and revitalized the old emergency legislation and gave itself powers as sweeping as those wielded by the old Stormont government. Then, as a tactic for restoring order, it played down the military aspect of its security policy and played up the primacy of the police and the courts.

However, as Dermot Walsh reports:⁷ "The change from a military to a civilian police strategy . . . has been more apparent than real. The RUC is anything but a

⁶ British lawyers have a name for American lawyers who see the Magna Carta as more than a feudal contract among nobles. They call them "Runnymede men" after the field in which it was supposed to have been signed. The field was rescued from obscurity not by the British, but by the American Bar Association.

⁷ "Civil Liberties in Northern Ireland," in Peter Wallington, "Civil Liberties 1984" (Oxford: Martin Robertson, 1984), p. 335. See also, "Shoot to Kill?: International Lawyers Inquiry into the Lethal Use of Firearms by the Security Forces in Northern Ireland" (Cork and Dublin, Mercier

Continued

civilian police force. Its officers are armed and have been suspected of operating a "shoot-to-kill" policy recently, following a series of incidents in which a number of unarmed republicans have been shot dead at RUC road-blocks. . . . In certain areas they wear bullet-proof vests, travel in military-style Land Rovers and operate in military fashion. In fact their role in republican areas is almost identical to that of the British army and the UDR [Ulster Defense Regiment]; the only apparent difference being their uniforms."

How deeply para-military the policing of Northern Ireland is can be seen in the nature and scope of the government's modern emergency powers. For example, under Section 11 of the Emergency Provisions Act a police officer can arrest anyone he suspects of involvement in terrorist activity. The suspicion does not have to be reasonable; nor must the suspect have committed any offense. Once the person has been taken into custody, the police are not obliged to inform him of the specific nature of their suspicions. All they need do is say that they suspect the person of involvement in terrorist activity. This lack of specificity, of course, can be terrifying to anyone they seize. Once arrested, the suspect can be held for three days in jail without ever being told what he is thought to have done or when he is supposed to have done it.

If the policeman has some articulable grounds for his suspicion (i.e. more plausible than a hunch), he can detain the suspect for up to seven days pursuant to section 12 of the Prevention of Terrorism Act. Under section 14 British soldiers can, without satisfying the common law standard of "reasonable cause," arrest anyone they suspect of any offense, no matter how trivial, and hold them for questioning for up to four hours. This power is used primarily for screening purposes, intelligence gathering, surveillance, and harassment.⁸

Coerced confessions are not supposed to be admissible in the courts of Northern Ireland, but there is substantial evidence that the police did coerce suspects to confess during the early and mid-1970s, and that their confessions were admitted into evidence. The techniques, adapted from counter-guerrilla interrogations in Malaya, included prolonged interrogations separated by exhausting and painful exercises, including prolonged wall-standing. Suspects were deprived of food and sleep, hooded, and subjected to continuous, monotonous noise.⁹ After the government of Ireland took the United Kingdom to court,¹⁰ the abuses diminished, but "the latest figures . . . show that convictions are still heavily dependent on confessions and in a substantial number of cases accused people are confessing in the interrogation rooms to offences that they were not initially suspected of."¹¹ The police remain legally free to use bribes, threats, false promises, exhaustingly long interrogations, and verbal abuse to get suspects to implicate others or themselves. In the view of at least one Lord Justice, the police may even apply a "moderate degree of physical maltreatment for the purpose of inducing a person to make a statement" without the resulting admissions being declared inadmissible as evidence.¹² Under the emergency legislation, no warnings of legal rights are required and access to legal counsel is restricted.

For alleged terrorists, the arbitrary system of arrests and the harsh system of interrogations are followed by trial-without-jury. One of the cardinal rules of extradition is that surrender will not be authorized if the accused is to be tried by a special

Press, 1985), especially Appendix A: Civilians Shot Dead in Disputed Circumstances by Members of the Security Forces in Northern Ireland, 135-150. Similar findings are expected to be released shortly by a group of British detectives who investigated the killings of six unarmed men in three separate incidents in 1982 by clandestine units of the RUC. "Shoot-to-kill" report due," Irish Times, Aug. 12, 1985, 6.

⁸ Walsh, "Civil Liberties in Northern Ireland," supra, n. 13, at 336, citing *Regina v. Home Secretary, ex parte Hosenball*.

⁹ See, e.g. Peter Taylor, "Beating the Terrorists" (London: Penguin, 1980); Kevin Boyle, Thomas Hadden, and Paddy Hillyard, "Ten Years On in Northern Ireland: The Legal Control of Political Violence" (London: Cobden Trust, 1980); "Report of an Amnesty International Mission to Northern Ireland" (London, Amnesty International, 1978); and "Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland" (Cmd. 7497, HMSO, London, 1979) (the Bennett Report).

¹⁰ *Ireland v. United Kingdom* (Application No. 5310/71). In 1977 the European Court ruled that these practices amounted to inhuman and degrading treatment in violation of the European Charter on Human Rights.

¹¹ "Civil Liberties in Northern Ireland," supra, n. 13, at 338, citing his "The Use and Abuse of Emergency Legislation" (London: Cobden Trust, 1983), chs. 3 and 4.

¹² Opinion of McGonigal, J. in *Regina v. McCormick* [1977] Northern Ireland Law Reports, p. 105, interpreting section 8 of the Emergency Provisions Act.

court created solely to prosecute alleged terrorists.¹³ Thus, before the U.S. State Department would agree to surrender the alleged Palestinian terrorist Abu Eain to Israel, it won Israel's agreement to try him in an ordinary criminal court. The proposed treaty with the United Kingdom contains no such safeguard against kangaroo courts; alleged terrorists are tried before a judge alone in what are known as "Diplock courts" (after the author of the report recommending them).

Of course, it is possible that a person might receive justice in such a court, and there is evidence that some of the judges who sit on these courts are skeptical of some of the evidence brought before them by the police. But it is difficult to believe that trials there are fair when the acquittal rate in Diplock courts is well below the acquittal rate in ordinary Crown Courts.¹⁴

It is also difficult to believe that trials there are fair when many of the alleged terrorists are convicted on the uncorroborated testimony of "supergrasses"—persons who, having taken part in serious crimes, agree to implicate, and testify against, large numbers of persons, in return for immunity from prosecution and the benefits of a witness relocation program.¹⁵ The number of persons these "supergrasses" have accused, the detailed nature of their testimony, the temptation they have been under to "make the story better," and the pressure on their police handlers to break the rebellion by all possible means, all combine to make it doubtful that the Diplock courts are fair. Yet these courts, and not the criminal courts of London, are where most PIRA suspects will be tried if the proposed treaty is ratified.

The picture painted by administration officials in court and before this Committee is of an ordinary government in Northern Ireland beset with a serious crime problem, not an authoritarian government that rules by emergency legislation and in derogation of the civil rights normally associated with ordinary government in Europe and America. Yet even the British government has had to admit the harsh reality. In 1957, 1969, and 1971, the United Kingdom formally excused itself from the obligation of living up to the European Convention on Human Rights. To be excused from that obligation, it had to certify that it was faced with "war or other public emergency threatening the life of the nation."¹⁶ It did, and the derogations remained in force until 1984.

The evidence as a whole

There is no acid test for the fairness of any legal system. The best one can do is to compare what we know of the laws, practices, and political realities of the requesting regime against what we consider to be indicia of systemic unfairness.¹⁷ Taking the evidence as a whole—the violent nature of the rebellion, the paramilitary nature of policing, the arbitrary laws governing arrests, the history of abusive interrogations, the special courts for alleged terrorists, the admission of testimony that neither our courts nor the criminal courts of Britain would accept, and the heavy reliance on the uncorroborated testimony of immunized accomplices, and the derogations from the Human Rights Convention—only one conclusion can be drawn: the risks of injustice are too great to allow the extradition of alleged members of the PIRA to Northern Ireland at this time.

APPENDIX 3. LEGITIMATE MODES OF REVOLUTION AND COUNTER-REVOLUTION: THE SEARCH FOR STANDARDS

Underlying the debate over this treaty is the belief that the law of extradition, to be humane, must set limits on how a revolution (or counter-revolution) may be conducted. Once those limits have been breached, respect for the transgressors' moral right to revolution (or claim to governmental legitimacy) should dissolve, and the moral obligation of the United States to shield them from punishment should disappear. Indeed, it may be replaced by an obligation to see that the transgressors are punished. Such is the sentiment, and the principle, that underlies the current debate.

¹³ It should be recalled that among the grievances listed in our Declaration of Independence was that the King had "depriv[ed] us in many cases of the benefits of Trial by Jury," and had "transport[ed] us beyond Seas to be tried for pretended offences." The special courts objected to there were admiralty courts sitting in Halifax without juries.

¹⁴ Boyle, Hadden, and Hillyard, "Ten Years On," *supra*, n. 9, pp. 59-62.

¹⁵ See generally the report of Lord Gifford, Q.C., "Supergrasses: The Use of Accomplice Evidence in Northern Ireland" (London: Cobden Trust, 1984).

¹⁶ *In Matter of Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. 1981), at 73-74.

¹⁷ For one set of criteria, see Barbara Banoff and Christopher H. Pyle, "To Surrender Political Offenders": The Political Offense Exception to Extradition in United States Law," 16 *Int'l L. & Pol.* 169, 202-203 (1984).

Defining terrorism

To regimes under attack, of course, all rebels are terrorists. As Lord Diplock defined terrorism for the British, it is "the use or threat of violence to achieve political ends."¹ By this definition, even George Washington would be a terrorist. Indeed, the definition denies any moral right to revolution under any circumstance. Nor does it admit that States, as well as revolutionary groups, often use or threaten violence for political ends.

Regimes under attack cannot, for obvious political reasons, accept a definition of terrorism that concedes to the people of any nation both a right to revolt and a right to defend the established regime. Such an evenhanded definition would tempt potential allies to stand neutral towards the dispute.

Similarly, regimes under attack cannot accept a definition of terrorism that could be applied to their own officials, should they be forced to flee. Everything a beleaguered regime does to suppress a revolt, including emergency legislation, internment without trial, house-to-house searches, abusive interrogations, and a "shoot-to-kill" policy against suspected rebels, must be characterized as legitimate law enforcement measures. The British, who might condemn the same measures when used against rebels in the Philippines, South Africa, or Eastern Europe, naturally feel compelled to defend them when employed by British authorities in India, Palestine, Cyprus, or Northern Ireland.²

However, an honest definition of terrorism must be applicable to governments as well as rebels, and if terrorism is not the right word to describe some illegitimate modes of repression, other terms, such as "war crimes," "crimes against humanity," or "wanton crimes" must be developed. Then we can be evenhanded in our extradition policy.

Reagan administration officials freely admit that they cannot come up with a definition of terrorism that is politically neutral. As the Deputy Director of the State Department's Office of Combatting Terrorism testified in the *Mackin* case, "one mans terrorist is another man's freedom fighter."³ Stephen S. Trott, Assistant Attorney General in charge of the Criminal Division, argues quite candidly that anyone who rebels against "a friend and ally" of the United States is, for purposes of the law of extradition, a terrorist.⁴

Abraham D. Sofaer, Legal Advisor to the Department of State, also offers a political, rather than a legally neutral, definition of terrorism. Testifying before this Committee in August, he defined a terrorist as anyone who violently attacks "stable democracies in which the political process is available to redress legitimate grievances and in which the judicial system provides fair treatment."⁵

Absent from Judge Sofaer's analysis is any serious consideration that it may not be "terrorism" per se for foreign peoples to resist the occupation of their communities by the armed forces of "stable democracies." Thus, it does not matter to Judge Sofaer that Britain is to hundreds of thousands of Irishmen an alien force on their island, or that Israel is to most West Bank Palestinians an invading government and an invading population. It does not matter to the Judge that to many Moslems in Lebanon the United States forfeited its claim to being a neutral, peace-keeping force when it shelled their positions in support of Christians fighting to retain control of the government. Nor does it matter to him the off-duty American soldiers shot in El Salvador were to Sandinistas part of a military machine supporting the invasion of their country. Because these people choose to resist the "stable democracies" of Britain, Israel, and the United States they are called terrorists. By Judge Sofaer's definition, even George Washington would be a terrorist.

Similarly, Judge Sofaer refused to admit that some of the acts of British forces in Northern Ireland, Israeli forces on the West Bank, or American-backed contras in Nicaragua might, in the eyes of a neutral observer, constitute acts of terrorism. If we hesitate to condemn the indiscriminate use of lethal force by governments, or

¹ Report of the Commission on Legal Procedures to Deal With Terrorist Activities in Northern Ireland, ch. 3, para. 3 (the Diplock Report).

² Similarly, most Americans at the time of Lincoln's suspension of the privilege of the writ of habeas corpus during the Civil War, the army's suppression of the Indians, or General Arthur McArthur's brutal campaign against the Hukbs would not be likely to recognize the illegitimacy of those measures.

³ Frank H. Perez, Deputy Director, Office of Combatting Terrorism, U.S. Department of State. In *Matter of Mackin*, Hearing transcript at 1357.

⁴ Quoted by David Lauter in "U.S., Britain Sign New Pact on Fugitives," *National Law Journal*, July 29, 1985, pp. 5, 33.

⁵ Transcript of testimony before the Committee on Foreign Relations, U.S. Senate, Aug. 1, 1985, p. 11.

draw back from calling it terrorism, then we should be careful what we condemn as illegitimate when talking about rebels.

Of course, if the treaty before us were a matter of politics, rather than law, we could be as loose with our language as we like. But extradition is a matter of law, not politics. Its definitions of who are to be shielded and who are to be surrendered must be both intellectually honest and politically neutral.

So, if we are going to work the concept of terrorism into our law of extradition, we need a neutral definition of the phenomenon—one that respects the right of foreign peoples to resist invasion (even by the most stable democracies) and that does not call a less-than-democratic regime terroristic when it used ordinary law enforcement means against even democratic revolutionaries.⁶ Unfortunately, we are not likely to find that neutral definition in most popular definitions of terrorism.

Terrorism, in common parlance, refers to those acts or threats of violence which are calculated to instill fear—indeed terror—in the minds of a target population. Strictly speaking, terror must be the primary objective, not the incidental by-product, of the frightening acts or threats. That is why, when we think of terrorists, we think first of persons who attack or threaten presumptively innocent or helpless persons, or who kidnap, bomb, or murder for symbolic reasons. Terrorism, in its most pejorative sense, refers to acts or threats of violence that are wanton, indiscriminate, and without any immediate, practical objective. It is, in the words of some nineteenth century anarchists, "propaganda by deed." In twentieth century terms, terrorism may be characterized as a form of "psychological warfare" directed against non-combatants and carried out by such means as the mailing of letter bombs, the killing of innocent travelers at airports, or the bombing of civilian airliners while in flight.

Contrary to popular impressions, terrorism in this "pure" sense is relatively rare. Far more common are acts and threats of violence which are intended both to achieve an immediate, practical objective, and to sow terror in the minds of a particular population. Typical examples include kidnapping to extort concessions or the bombing of army barracks. In such mixed-motive situations, one man's terrorist is likely to be another man's "freedom fighter." Thus Israelis today denounce West Bank Palestinians who bomb marketplaces as terrorists, while looking upon the leaders of their own terrifying attacks on the British in 1948 as national heroes. Americans do the same when they look back fondly on the "Sons of Liberty" who fomented revolution in colonial Boston. From the British perspective, the Sons of Liberty terrorized loyal subjects by burning the governor's house, attacking ships, destroying cargoes, tarring and feathering Tories, and sniping at General Gage's troops.

The greatest terrorists of history, of course, have almost always operated from established positions of power. Their ranks include Robespierre's Jacobins, the Tsars's secret police, Stalin's secret police, Hitler's Gestapo, Haiti's tonton macoute, South Africa's secret police, Khomeni's revolutionary courts, Chile's DINA, and Latin America's military and civilian death squads.

Nor is all governmental terrorism internal; some is made for export, including the U.S.-sponsored secret war against Cuba, the U.S.-sponsored Phoenix program in Vietnam, and the CIA's plots to assassinate Fidel Castro and Patrice Lumumba. It is disconcerting to think of these CIA operations as terroristic in effect, if not in purpose, but we cannot condemn Libyan assassins as terrorists unless we are willing to accept the same characterization for our own hired killers. Similarly, if we are going to change the law to deprive IRA gun runners of the political crimes defense to extradition, then we must deny the same defense to CIA operatives who supplied guns to coup-makers in the Dominican Republic and who now support an army that is raiding Nicaragua. Nor can we condemn Chile for refusing to extradite the DINA officials who plotted the murder of Orlando Letelier in Washington, D.C., unless we are willing to extradite the CIA operatives who supplied guns to the group that killed Chile's General Schneider. By the same token, we should not shrink from extraditing to New Zealand any of the French frogmen wanted for the sinking of the Greenpeace ship and the killing of one of its crew members. That is what adherence to neutral principles in the writing of law means.

The double standard of morality evident in these comparisons suggests that the term "terrorism" is too imprecise, too freighted with political judgments, and too open to misunderstanding to be a useful category in the American law of extradi-

⁶ We should remember that the moral right of national self-determination recognized in our Declaration of Independence was not a right to establish a democracy or a "republic." It was a right to institute any form of government which "shall seem most likely to effect their Safety and Happiness."

tion. However, the humanitarian sentiment, and principle, behind the proposed treaty are not. What cannot be achieved directly may be achieved by indirection.

Terrorism and the incident-to-an-uprising test

It seems to me that the political crimes defense to extradition and its exception for wanton crimes go far towards achieving the humanitarian objective of this treaty. To win protection of the political crimes defense, the accused cannot simply claim that his participation in a shooting or bombing was politically motivated; he must prove that it was incidental to, and in furtherance of, an uprising (or the suppression of an uprising). Thus the Supreme Court refused to shield from extradition three individuals wanted for participating in an armed raid from Texas into Mexico. The raiders had attacked soldiers as well as citizens and had claimed that their motives were political, but there was no evidence of a larger uprising at the time, or that the raid was anything but a non-political rampage.⁷

The requirement that an uprising exist and that the alleged acts be incidental to that uprising is integral to respecting the moral right of revolution. That right, like the right of national self-determination, is preeminently a collective right. It is the right to join with others to decide the political fate of the community.

By requiring proof of both an uprising and a nexus between the act and the uprising, our courts have avoided the risk of granting the political crimes defense to isolated individuals or groups that have no popular support and who may be acting out of narrow self-interest or sheer political madness. The uprising test assures that the political crimes defense will not be granted to members of such isolated groupuscles as the Red Army Faction in West Germany or the Direct Action ring in France whose attacks on NATO installations are, without question, politically motivated.

The wanton crimes exception for unauthorized terrorism

The wanton crimes exception to the political crimes defense is an effort to place some outer limits on how an uprising may be fought (or suppressed) and still command the respect (though not necessarily the support) of outsiders. In this regard, it is like the four Geneva Conventions for the Protection of War Victims,⁸ the *attentat* clause,⁹ the war crimes exception recognized by some countries,¹⁰ and the Swiss concept of "proportionality."¹¹

The wanton crimes exception was first enunciated in the case of a Palestinian wanted by Israel for planting a bomb in a civilian marketplace.¹² The court refused to shield the accused from extradition "even though [the bombing] had a political objective and was connected to an armed struggle,"¹³ because the bombing involved an unauthorized, indiscriminate attack on a civilian population. Such an act, the court ruled, was essentially anarchistic, and for that reason, unworthy of protection.¹⁴

There are three elements to this exception that need to be understood. First, the exception assumes that a meaningful distinction can be drawn between rebels and terrorists in terms of the nature of the way they fought for power. Second, it advances a distinction that can also be applied to former officials and the way they fought to retain power. Third, it distinguishes between authorized and unauthorized violence.

The first two elements permit the courts to extradite terrorists and war criminals on either side of a foreign political dispute, and thus solve the problem that the proposed treaty is supposed to address. The third element is an important limitation on

⁷ *Ornelas v. Ruiz*, 161 U.S. 502 (1896). For an interesting, albeit unnecessary, effort to codify this "incidence test" see H.R. 3347, 98th Cong., 1st Sess. 3194(e)(3).

⁸ 75 U.N.T.S. 85, 135, 157, and 287, 6 U.S.T. 3217, 3114, 3116, 3516, T.I.A.S. 3363, 3362, 3364, and 3365 (all effective Oct. 21, 1950).

⁹ A common clause in extradition treaties that exempts from the political crimes defense persons who attempt to kill heads of state or their families.

¹⁰ See generally Garcia-Mora, "Crimes Against Humanity and the Principle of Non-extradition of Political Offenders," 62 Mich. L. Rev. 927 (1964); Green, "Political Offences, War Crimes and Extradition," 11 Int'l & Comp. L. Q. 329 (1962), and Neumann, "Neutral States and the Extradition of War Criminals," 45 Am. J. Int'l L. 495 (1951).

¹¹ "Proportionality," according to the Swiss law of extradition, means that the methods used to achieve a political purpose must be proportional to the end, and therefore not unnecessarily violent. For a discussion of the strengths and weaknesses of this test see Barbara A. Banoff and Christopher H. Pyle, "To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law," 16 J. Int'l L. & Pol. 169, 197-199 (1984).

¹² *Abu Eain v. Wilkes*, 642 F.2d 504 (7th Cir. 1981).

¹³ *Id.* at 521-22.

¹⁴ *Id.* at 521-22.

the first two, and a way of preventing humanitarian exceptions from devouring the political neutrality and evenhandedness achieved by the political crimes defense.

If the court's opinion is read carefully, Abu Eain's problem was not that he may have planted a bomb in a trash can in a crowded civilian marketplace, but that he was thought to have done so without clear authorization from the PLO. Had he confessed to planting the bomb (instead of asserting his innocence), and then claimed to have acted under PLO orders, he might not have been extradited.¹⁵

Thus, when Judge Sofaer told Senator Pell on August 1 that PIRA members might not be extraditable for killing Lord Mountbatten and his sailing companions, the judge was correct.¹⁶ The wanton crimes exception, as currently drawn, only permits extradition for wanton crimes that were not authorized by a revolutionary organization (or its governmental opposition).

On first examination, this limit on the wanton crimes exception may seem too narrow. Persons who commit unconscionable acts of indiscriminate violence should not be shielded from extradition merely because they can raise an Eichmann defense. Morally there is not much difference between the PIRA members who, acting without orders, bombed Harrods, a band concert, and the Queen's ceremonial Horse Guards, and PIRA members who, acting on orders, blew up the retired general and his guests. All these targets seem too remote from the conflict to be fair game for attack.

However, the PIRA did not consider Lord Mountbatten remote from the conflict; in large part their war consists of symbolic acts against British authority. Convinced that they cannot win by traditional military means, they are trying to demonstrate to all residents of Northern Ireland, as well as to the British government, that the British will never be able to provide adequate security at a tolerable cost and must, therefore, eventually withdraw.

In some respects, this is what George Washington did by attacking Trenton. The victory did not significantly affect the balance of forces, but it did demonstrate to the British and their Tory sympathizers that British outposts in New Jersey could not be relied on. Washington, however, only attacked military targets; he did not order clandestine units to go out and assassinate retired lords or blow up military band concerts for the elderly in London. The American Revolution is remembered as the last "clean" revolution because of its relative lack of such atrocities. Thus many Americans cannot understand why the PIRA, and other revolutionary groups, do not follow our example.

The easy answer is that they ought to follow our revolutionary example. And it is an easy answer for Americans to give, since we tend to be as free with moral prescriptions for other countries as we are ignorant of their politics and culture.

To be realistic, however, we should look at least try to understand the problem of fighting a fair fight from the position of the alleged terrorists. From the perspective of the PLO, the Israelis on the West Bank are the invaders. Ziad Abu Eain was, himself, born in a refuge camp of parents displaced by this invasion. The invaders were not simply the Israeli police and army, but the Israelis who came there to settle, and thereby exclude (or dominate) Abu Eain and his family. In that situation, can we really say that it was unreasonable for Abu Eain—or the PLO—to make this invading population insecure by random bombing? From the perspective of the Palestinians, can any Israelis be presumptively innocent persons?¹⁷

The wanton crimes exception and the recent PIRA cases

Of course, Northern Ireland is not the West Bank; the British invasions took place centuries ago and a majority of the people there deem themselves British and support continued British rule. Even so, if we are trying to understand what constitutes a fair fight in a revolutionary situation, it may be instructive to see how the PIRA has chosen to fight the British, particularly as seen through the windows provided by the four recent extradition cases that the current administration finds so outrageous. By examining those cases more closely, we may come to a better understanding of whether this treaty is needed, or how better we might draw the line between those rebels (and former officials) we wish to shield, and those terrorists we wish to extradite.

¹⁵ *Abu Eain v. Wilkes*, 641 F.2d 504, 520 (2d Cir. 1981). Accord: *Quinn v. Robinson*, No. C-82-6688 RPA, (N.D.Cal. 1983), now on appeal.

¹⁶ Hearing before the Committee on Foreign Relations, U.S. Senate, August 1, 1985, transcript, pp. 91-95.

¹⁷ Similarly, from the perspective of rebel forces in Afghanistan, are there any presumptively innocent Russians in Kabul?

McMullen. The first "terrorist" sought by the British was Peter McMullen. He was a soldier in the British Army stationed near Belfast when, on "Bloody Sunday", January 30, 1972, soldiers from his own unit fired into a crowd of unarmed protesters in his home county of Derry, killing 13.¹⁸ Outraged by these killings and by the unwillingness of the Loyalists and British to respond constructively to more than five years of non-violent protests, McMullen deserted the army to join the PIRA (and left a bomb in the barracks behind him). Five years later, disenchanted with the PIRA, he fled to the United States, only to be arrested charges of planting yet another bomb at a military barracks in England in 1974.¹⁹ That bomb killed a cleaning woman, and although there is no evidence that McMullen meant to kill her, he is called a terrorist.

Mackin. Desmond Mackin, the second "terrorist" sought, was only eight years old when he and his family were first driven from their East Belfast home by gun-wielding Loyalists. The family moved to a largely Catholic community in West Belfast, only to be forced out again by Loyalists in 1969. This time the mob beat them and burned their home (along with 500 others). The Mackins were reduced to living in a barricaded community on relief until emergency housing became available across the city in Andersontown.

These acts of terrorism, which British authorities lacked the ability or will to stop, drove Desmond Mackin into the PIRA. There he saw many of his friends interned without trial. He was too young to be interned, but he was convicted of membership in a proscribed organization (something that could not be made a crime under the laws of the United States) and sentenced to five years in Long Kesh, a prison known for its brutal conditions. Released in 1976, Mackin continued to work for the PIRA and was kept under close surveillance by undercover British troops.

In 1978, while out searching for a lost taxicab, Mackin and a PIRA colleague found themselves surrounded by undercover operatives. Fearing harm, they sought to overpower one and break away. During the ensuing struggle, all three men were shot. The soldier received one gunshot wound, Mackin three, and his companion seven. Released on bail, Mackin fled to the Republic of Ireland and from there to the United States, where his activities on behalf of civil rights in Northern Ireland won him a commendation from the Pennsylvania legislature.

On October 6, 1980, Mackin was arrested in New York on charges that he had shot the plainclothes British soldier. The U.S. Department of Justice demanded his extradition, even though the U.K.'s evidence that he shot the soldier was dubious at best. Specifically, the British could not produce the gun Mackin was alleged to have fired, although they captured him at the scene. They admitted that their forensic laboratory could find no traces of gunpowder on his hands or clothing, and their medical expert agreed that the soldier was probably shot from a distance of more than 100 feet, which means that he probably was shot by another soldier firing at Mackin.²⁰ Despite this evidence, the U.S. Justice Department continues to call Desmond Mackin a terrorist.

Doherty. Joseph Doherty, another child of the "troubles" in Northern Ireland, was arrested in June 1983 at the behest of the British, who, having convicted him in absentia in a juryless "Diplock court" for offenses associated with the killing of a British Army officer and an escape from prison, wanted him back for punishment. According to papers submitted to court on his behalf,²¹ Doherty admitted joining Na Fianna Eireann, a Republican youth organization, in 1970 at the age of 15 and the PIRA in 1972 at the age of 17. By the time he joined the PIRA, he had already been removed from his parents's home twice by armed soldiers for interrogation about political matters. Days after his seventeenth birthday, Doherty was interned without trial in the Long Kesh prison camp. Upon release, he joined an Active Service Unit of the PIRA.

The shoot-out in which the Army captain died was intended by Doherty and his associates to be an ambush. To prepare that ambush, they seized a house and locked its inhabitants in a back room. Their plan was to shoot down from the upper floors of the house at a British army convoy as it slowed for the traffic light and intersection below. However, the army learned of their plan and sent a special plainclothes unit armed with automatic weapons to capture them. In the course of the shoot-out

¹⁸ In the history of Northern Ireland, "Bloody Sunday" is the political equivalent of our "Boston Massacre" of 1770.

¹⁹ *In Matter of McMullen*, Mag. No. 3-78-1099 MG (N.D. Cal. 1979).

²⁰ *In Matter of Mackin*, 80 Cr. Misc. 1, 7-21, 84-91 (S.D.N.Y. 1981).

²¹ How Doherty became involved in the PIRA is not clear from the District Court opinion in his case, so I have relied on facts presented in Respondent's Post-Hearing Memorandum, *In Matter of Doherty*, 83 Cr. Misc. 1 (JES), filed June 22, 1984, at 28-34.

which followed, the captain who led the attack was killed, and Doherty and others were captured. At no time did Doherty or his associates use the occupants of the house as shields or hostages.²²

Similarly, when Doherty and others, acting on orders from the PIRA and under his leadership, broke out of the Crumlin Road Prison they did not use other prisoners or guards as shields or hostages. The only persons injured in this escape, according to Doherty's counsel, were guards who tried to prevent the escape.²³ Doherty and his fellow escapees chose to cross the prison yard and pass through four separate gates unshielded.²⁴ According our government, however, both the shoot-out and the escape were the acts of a terrorist.²⁵

Quinn. The fourth PIRA extradition case involved William J. Quinn and, unlike the cases of McMullen, Mackin, and Doherty, reveals a side of the PIRA that supports accusations of terrorism. Quinn, as a member of the "Balcombe Street Four," is wanted by the British for a series of crimes, including conspiracy to cause explosions and the murder of a constable. The charge of murdering an off-duty constable in the course of escaping capture presents no line-drawing problems with the political crimes defense; the constable was trying to block Quinn's escape. However, line-drawing questions do arise out of the conspiracy to bomb charges.

To support those charges, the British presented evidence that they had found Quinn's fingerprints on the wrappings of four bombs sent through the mails, another left on the loading platform of a railway station in England, and still another left outside a burger grill in London. Fingerprints belonging to a co-conspirator were found on the timing mechanism of another bomb left in a pub. One letter bomb (placed in a hollowed-out Bible) was mailed to the Catholic chaplain to the British Armed Forces. Another was sent to a Crown Court judge, and a third was sent to the chairman of the Daily Express newspaper. The bomb sent to the chaplain was defused, but the bomb sent to the judge partially exploded, injuring his face and destroying parts of his hands. The third exploded in the hands of a security guard, and blew away most of his left hand. The other bombs were discovered and rendered harmless.²⁶

Morally, the mailing of letter bombs and the planting of bombs at a railway station, pub, and grill seem indistinguishable from the marketplace bombing for which Ziad Abu Eain was extradited. The magistrate thought so, and ordered Quinn extradited, but the judge who heard his petition for a writ of habeas corpus disagreed. The issue is now on appeal.

This, I submit, is where the current debate should be focused. The four PIRA cases should not be lumped together as the administration has sought to do. Instead, the first three should be accepted as wise and traditional applications of the political crimes defense and the fourth reexamined as a possible candidate for the wanton crimes exception.

In ruling that Quinn was not entitled to the political crimes defense, the magistrate decided that the six bombing attempts could not be deemed incidental to the Irish uprising because they were directed at innocent civilians, or were delivered in ways that evidence wanton disregard for the lives of innocent civilians. In rejecting that opinion, Judge Robert P. Aguilar read the *Abu Eain* decision as establishing a wanton crimes exception only in cases where the accused acted like an anarchist and bombed civilians because he "did not want the population they represented to exist."²⁷ The judge did not claim that Quinn's alleged bombings were more focused than Abu Eain's; only that the PIRA's campaign was more focused than Abu Eain's act. I cannot find any source for the genocidal motive that Judge Aguilar attributed to Abu Eain, and I cannot agree that Quinn's alleged bombings were sufficiently focused to release him from the judgment that he acted in wanton disregard for innocent human life.

Total abstention from judgment

Accordingly, the crux of Judge Aguilar's opinion must be found in his second reason for not following the court's decision in *Abu Eain*. "Such expressions of emo-

²² Interview with Mary Boretz Pike, counsel for Joseph Doherty, August 13, 1985.

²³ *Id.*

²⁴ Respondent's Post-Hearing Memorandum, *In Matter of Doherty*, 83 Cr. Misc. 1 (JES), filed June 22, 1984, at 33.

²⁵ Indeed, when the court decided that Doherty was entitled to the political crimes defense, Stephen S. Trott, Assistant Attorney General in charge of the Criminal Division, publicly denounced the ruling as "outrageous." Stuart Taylor, Jr., "U.S. Aide Faults Judge's I.R.A. Extradition Ruling," *New York Times*, Dec. 19, 1984, A23.

²⁶ *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. 1983).

²⁷ *Id.* at 34-36.

tion," he wrote, 'have not been part of the historic function of the extradition court while determining the applicability of the political offense exception. As stated by the first United States court to rule on the applicability of the political offense exception: '... I have no authority... to determine what acts are within the rules of civilized warfare, and what are not.'"²⁸

With due respect, I believe that the judge had the authority, but chose not to accept it. He had the authority because neither Congress nor the treaty-makers chose to define what constitutes a political offense. However, his reason for not exercising that authority merits careful consideration:²⁹ "Liberal application of the *Eain* decision could result in the extradition court making judgments as to the goals of a particular uprising group and the appropriateness of the acts of the uprising group. Inherent in any situation where political change is sought are conflicting opinions on the merits of the sought-after change and the methods used to seek the change. Extradition courts must avoid becoming caught up in such controversy."

In Judge Aguilar's opinion, total abstention from any second guessing as to how to fight fair in a revolution (or counter-revolution) is the best that courts can do. His concern has a long pedigree, and reflects the same desire for judicial neutrality that led courts to adopt a rule of non-inquiry into the capacity of the requesting regime to do justice.

In the final analysis, I am uncomfortable with this plea for total abstention from any judgment regarding the morality of the tactics used to conduct (or suppress) a rebellion. It seems to demand that the courts turn a blind eye to wanton, indiscriminate killing.

On the other hand, liberal application of the wanton crimes exception could result in a fast slide into righteousness and political intervention. Do we really want our courts assessing the morality of the means used by foreign revolutionaries (or governments) to conduct (or suppress) a revolution?³⁰ Can they find a way to do it that will not inexorably lead them to favor some groups (or governments) and disfavor others, not because their means were legitimate, but because their ends were admirable (or reprehensible)?³¹

The question thus becomes, is it possible to find some middleground between total, amoral abstention, and a self-righteous, but wholly unrealistic, insistence on rebellion (and counter-revolution) without violence?

The Court of Appeals may have thought it found that middleground when it developed the exception for unauthorized wanton crimes. But that approach has its problems too, not the least of which is that it permits former revolutionaries and former government officials charged with heinous crimes to offer an Adolph Eichmann defense: "I was only following orders."

The laws of war approach

An alternative approach is to specify in advance those forms of fighting that are unacceptable under any circumstance. This is what we have tried to do under the Geneva Conventions, which attempt to set humanitarian limits on how international armed conflicts may be fought. There is a distinguished school of thought that proposes extension of these standards downward from wars among nations to armed conflict within nations.

Under the Geneva Conventions, certain "war crimes" (called "grave breaches") are deemed so heinous that the signatory nations have agreed to search for the wrongdoers and either extradite or punish them. The third article in each of the four conventions imposes upon the United States an obligation to extradite or punish all fugitive soldiers charged with offenses against persons who are *hors de*

²⁸ Id. at 37, quoting *In re Ezeta*, 62 F. 972, 997 (N.D. Cal. 1894).

²⁹ Id. at 38.

³⁰ If they do undertake such an analysis, one way to prevent it from getting out of hand is to examine the actions of the accused, and not impute to him responsibility for the actions of his group (or government). Even so, there will be the temptation to judge him a terrorist because other members of his organization are outrageously wanton in their killings. Also, some judges may find it appropriate to apply some form of situational ethics, and assess the wantonness of the alleged offenses against the general level of indiscriminate killing characteristic of the struggle as a whole. Over time, one standard could develop for Moslem mountain fighters, another for African tribesmen, a third for Latin American jungle fighters, and another for urban guerrillas in Northern Ireland. If so, then the wanton crimes exception will fail to meet the standard of neutral and consistent applicability that we look for in legal tests.

³¹ It is sometimes said that judicial application of the political crimes defense entails a similar form of analysis, but that is not true. No moral judgment is required to say that, at some time in the recent past, there was an uprising in requesting state, and that certain acts were incidental to that uprising.

combat (civilians, prisoners of war, the wounded and sick). These offenses include violence to life and person (particularly murder of all kinds, mutilation, cruel treatment, and torture), the taking of hostages, outrages against personal dignity (especially humiliating and degrading treatment), and the passing of sentences and the carrying out of executions without judgment by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. The 1977 Protocols (which the Carter administration signed but which have never been submitted to the Senate for consent) further forbid medical or scientific experiments, the removal of tissues and organs of transplantation, corporeal punishment, indiscriminate attacks upon non-military objectives, the starvation of civilians, and collective punishments.³²

At the moment, the Reagan administration is withholding the Protocols from Senate consideration because the Joint Chiefs of Staff object to altering the definition of "armed conflict" in any manner that might force them to grant prisoner-of-war status, and hence legitimacy, to guerrillas like the Viet Cong.³³ Thus, even our own government has doubts about the wisdom of fighting insurgents by the standards of international wars.

Of course, the Protocols do not have to be adopted for their definitions of forbidden conduct to be incorporated in the American law of extradition. We could add those definitions to our law of extradition by amending this treaty or by drafting new legislation.³⁴ But first we would have to decide whether we should expect foreign revolutionaries (and governments) to fight civil wars by the Geneva standards when our own military forces find it expedient to deny to the rebels it fights the protections of prisoner-of-war status.

But even if our military were to agree to fight insurgencies by the laws of war, or by Washington's rules, we would still have a problem assuring fair applicability. How one side to a conflict fights a conflict is not within its choice only. The terms of engagement are transactional; they develop over time in response to the tactics used by the other side. Thus, the fact that the American Revolution was a relatively clean conflict fought largely with regular army units was not Washington's choice alone. The Howe brothers who opposed him from New York and Philadelphia also made a conscious decision not to turn the conflict into a "dirty" civil war by encouraging Tories (and Indians) to seize land and seek vengeance. There were times during the Revolution when the failure of Washington's efforts at European-style warfare gave rise to demands that irregular militias be unleashed, and had the British conducted their war irregularly, these demands might have become irresistible.³⁵

Perhaps because we are proud of Washington (and forget the dirty war in South Carolina) and because our so-called Civil War was really a war for independence fought between states and their armies, we fail to notice that most foreign revolts are more genuinely civil wars, involving deep religious, ethnic, or tribal animosities. They are conflicts not only between rebels and governments, but among violent and non-violent organizations competing for the support and control of segments of the civilian population. In these situations, revolutionary violence is used less to destroy the government's property and forces than to persuade segments of the population that they can no longer count on the government (or anti-government parties) to provide normalcy and must cooperate with (or accept direction from) the rebels.

³² 72 Am. J. Int'l L. 457-509 (1978). See generally Alfred P. Rubin, "Terrorism, 'Grave Breaches,' and the 1977 Protocols," Proceedings of the 74th Annual Meeting of the American Society of International Law, April 17-19, 1980, 192-196; Rubin, "Extradition of Terrorists," *International Practitioners Handbook*, June 1981, 10-11, and Draft Report of the Committee on International Terrorism, International Law Association, December 1981, at 14.

³³ Leslie H. Gelb, "War Law Pact Faces Objection of Joint Chiefs," *New York Times*, July 22, 1985, A1, A7.

³⁴ Another possible source of language that would exempt terrorists from the political crimes defense is the U.N. Convention on the Prevention and Punishment of Genocide. It exempts from the political crimes defense to extradition acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group," by: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." U.N.T.S. 277, 280, 282, Signed Dec. 9, 1948. Unfortunately, the vagueness of many of these provisions makes this convention a poor source of language to borrow.

³⁵ John Shy, *A People Numerous and Armed: Reflections on the Military Struggle for American Independence* (New York: Oxford, 1976), especially Ch. 6, "American Strategy: Charles Lee and the Radical Alternative," and Ch. 9, "The Military Conflict Considered as a Civil War."

The revolt in Northern Ireland is typical in this regard. In many respects, the PIRA appears to fight clean, as in the cases of McMullen, Mackin, and Doherty. However, within the ghettos of West Belfast it seeks to control Catholics not only by providing counseling services and taxicabs, but by knee-capping those it suspects of informing on them. PIRA members have also been known to disfigure the faces of Catholic girls who dared to date British soldiers. To intimidate Catholics from helping the British, the PIRA gunned down a judge and his daughter as they came out of church. To prevent Catholics from serving in the army, the "Balcombe Street Four" mailed a letter bomb to the bishop who served as chaplain to the British Armed Forces. To gain money for weapons, the Irish National Liberation Army (INLA) seized a supermarket owner for ransom within the Republic. The struggle in Northern Ireland, therefore, is not just a long-term effort to drive the British administration out, but is also a short-term struggle for control of the Catholic minority by terrifying, as well as non-terrifying tactics.

And between this conflict and the conflict with the British Army is the long-standing civil strife between the Protestant Loyalists and the Catholic Republicans. In this respect the Irish conflict is not unlike other "mixed" civil wars and wars for independence in Israel, Cyprus, Algeria, and West Africa. It is also typical of some revolutions in Latin America.

If we accept this reality, then we must admit that our relatively clean war for independence was exceptional, and we should be less quick to expect other revolutionary groups (or other governments) to employ Washington's methods. Thus, if we are determined to make humanitarian exceptions to the political crimes defenses—which is also a foreign policy of neutrality—perhaps we should set outer limits only.

The categorical exclusion of violent crimes

Set against this evolution of ideas for dealing with the extradition of alleged terrorists, the administration's approach seems simplistic. It would not ask whether there was an uprising, whether the uprising was popular, whether the regime had been oppressive, or whether the alleged conduct of the accused was vicious, wanton, odious, cruel, or unauthorized. It would preserve the political crimes defense and then, in defiance of all logic, simply declare that certain acts common to all revolutions and counter-revolutions are no longer "political."

The categorical approach purports to seek a humanitarian objective: the punishment of people accused of murder, bombing, hijacking, hostage-taking, and the like. In so doing, however, it denies that it might be legitimate to kill, bomb, hijack, or take a hostage under certain circumstances. That too, denies logic and experience.

The categorical approach favors the establishment in power, however bad that establishment may be. It says, for example, that it can never be legitimate to kill, or attempt to kill, a head of state, ignoring the possibility that the assassination of some megalomaniacs, like Adolph Hitler or Idi Amin, might be fully justifiable on humanitarian grounds.

The proposed treaty endorses several multi-national conventions that take the categorical approach and absolutely bar from the political crimes defense certain normally outrageous acts.³⁶ Again, the goal is commendable, but the language overbroad. How unwise absolute prohibitions can be is illustrated by numerous Cold War cases involving flights to the West.

For example, in 1950 three Czechoslovak airliners were hijacked by Czechoslovakians seeking freedom from Communist rule. All three planes landed in the U.S. Zone of Occupation in Germany, and in all three cases extradition of the hijackers back to Czechoslovakia was denied by the U.S. State Department. The Department explained:³⁷ "It is clear that these individuals fled Czechoslovakia for political reasons by whatever means they could find to escape. It has never been the practice of the United States Government to take action which would have the effect of subjecting political offenders to criminal jurisdiction. The position of the United States Government...was stated by Secretary of State Marcy...as follows: 'To surrender political offenders...is not a duty; but, on the contrary compliance with such a demand

³⁶ The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971), the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570 (effective Jan. 26, 1973); the U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (effective Feb. 20, 1977), and the International Convention against the Taking of Hostages, Dec. 18, 1979, U.N. Doc. A/RES/34/146, Dec. 17, 1979, ratified by the United States on July 30, 1980.

³⁷ XXII Dept. of State Buil. No. 563, Apr. 17, 1950, 595, 597.

would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind."

In 1951, a Czechoslovakian train was seized and forced into the U.S. Zone in Germany. The Czechoslovak Ministry of Foreign Affairs denounced the hijackers as "terrorists" and demanded their extradition. The Department of State again refused, invoking the political crimes defense to extradition and noting that "World opinion has not been accustomed to hold...that...persons who have sought to leave their country in order to obtain political asylum abroad are 'terrorists' and 'criminals.'"³⁸

And in 1954, Poland requested the extradition from Great Britain of seven Polish seamen, who, while their fishing trawler was at sea, seized the vessel and steered her into an English port, where they immediately demanded asylum. The British court was so taken by their plight that it granted them benefit of the political crimes defense to extradition even though, as in the four Czech cases, no uprising existed and violence had occurred.³⁹

Unfortunately, this history was forgotten during the hijackings of the 1970s and 1980s, with the result that our government must now prosecute, or subject to a sham prosecution, those hijackers it does not want to extradite back to police states. This corruption of the judicial process need not have happened if the draftsmen of the international conventions (or of the proposed treaty with the U.K.) had been careful to include an affirmative rule of inquiry. Then, without distorting the political crimes defense, with its requirement of an uprising, the courts could deny extradition on the ground that the hijackers could not be expected to receive a fair trial upon their return.

Conclusion

The categorical approach of the administration, which excludes all crimes of violence from the defense, is clearly unwise. It loads the law of extradition wholly against revolutionaries and wholly in favor of established regimes, whose indiscriminate killing can always be characterized as law enforcement (and who, with their superior firepower and organization, are most likely to prevail).⁴⁰

Even to extend the Geneva Conventions downward to non-international conflicts may also load the law of extradition against rebels unfairly. Drawing the line at wanton crimes which lack clear authorization, and therefore clear political responsibility, may be the most equitable and realistic policy our courts can pursue, even though it means accepting Eichmann defenses. I say this with regret, because I would prefer a higher standard for the conduct of non-international armed conflicts. However, our law of extradition must remain politically neutral. It cannot be loaded one way or the other and still command respect.

In any case, we must remember that the primary function of the political crimes defense is not to give us an opportunity to express our abhorrence of terrorism (by either side), or to achieve neutrality toward foreign conflicts, but to avoid judicial complicity in victors' justice. In some instances our courts will not be able, in good conscience, to send an alleged terrorist back for punishment because the people who seek his extradition are terrorists too.

Senator TRIBLE. Thank you, Professor Pyle.
Professor Bassiouni.

STATEMENT OF PROF. M. CHERIF BASSIOUNI, PROFESSOR OF LAW, DE PAUL UNIVERSITY

Mr. BASSIOUNI. Thank you, Mr. Chairman.

Judge Sofaer in his statement quoted from my book on extradition to point out that the first extradition treaty ever to be entered into was one between Rameses II and Prince Hatusedele in 1280 B.C. The process of extradition has been here a long time and it is surprising how little knowledge or understanding there is of it.

In particular, I was surprised to hear how little knowledge there was of the history of the political offense exception in extradition

³⁸ XXV Dept. of State Bull. No. 642, Oct. 15, 1951, 624-626.

³⁹ *Regina v. Governor of Brixton Prison ex parte Kolczynski* [1955] 1 Q.B. 540.

⁴⁰ Even if they do not prevail, their fugitive leaders (like Idi Amin) are more likely to be granted political asylum, and thus shielded from extradition for their wanton killings.

and, at the risk of sounding self-serving in the presentation, I should point out that if those interested in Justice and State would take the chapter on the political offense exception in my two volumes on the subject, they would find of the cases decided in the United States since 1848.

Senator BIDEN. Which chapters are those, Professor? [Laughter.] I am not being facetious.

Mr. BASSIOUNI. Chapter 9.

Senator BIDEN. Which volume?

Mr. BASSIOUNI. Volume 2.

Senator Pell pointed out very aptly that the political offense exception has never been historically abused in the United States. Indeed, I had the privilege of testifying before two committees of the House and two committees of the Senate on the extradition reform legislation since 1981. I was surprised to see repeatedly how the administration and other proponents of various legislation have stated that the purpose of extradition reform and of this treaty is to combat terrorism and various forms of violence.

There is no factual basis to demonstrate that this premise is validly represented. There is a valid basis to make a comprehensive change in the extradition laws of the United States. In the past 140 years, the political offense exception has been raised only 76 times and in the last 30 years it has been granted only 4 times. certainly not a factual basis to say that the United States will become a haven terrorists.

I think it is also important to note that in the article on exceptions in the supplementary treaty there are two categories of acts of violence. The first is what I call international crimes: hijacking, kidnapping of diplomats, taking of hostages, and mailing of letter bombs.

The United States is a signatory to each one of those relevant conventions on the subject. The conventions have been ratified. They have even been embodied in title 18 of the United States Code. Thus, the commission of any one of these crimes would be an exception to the political offense exception and extradition under current law would be granted to any country who is a signatory to these conventions or who has a bilateral treaty with the United States.

I say a signatory to these conventions because these conventions contain a clause whereby the multilateral treaty itself can be the basis of extradition irrespective of whether or not there is a bilateral treaty.

These crimes are distinguishable from the other crimes of violence that are listed in the exclusions contained in article one. These exclusions derogate over 140 years of experience in the United States and I should say at least 300 years of experience throughout the world where the jurisprudence of many countries has been recorded on the subject.

The political offense exception, when it involves an act of violence related to it, is subject to different criteria in different countries. Those applied in the United States have been related by Professor Pyle, and they emanate from the *Castioni* case which was decided in England, and thereafter applied in the United States, which has followed English jurisprudence. Both have been consist-

ent on the criteria for the political offense exception over the years.

The exclusions in the supplementary treaty are sweeping exclusions which go against our history and our experience. They go against our jurisprudence and they go against the jurisprudence of England and most countries that have dealt with the political offense exception over the years.

I think it is important also to reiterate that the very reason for the first Extradition Act in the United States, of 1848, was a decision by President Adams to surrender a sailor back to Great Britain. This, the first Extradition Act, was passed in order to properly place that decisionmaking process in the judiciary and not to leave it as a political determination to be made by the executive branch of Government.

The reason for that is essentially to maintain two things: consistency and neutrality. We have treaties with some 100 countries. If we would suddenly negotiate bilateral treaties with all of these countries, we would lose consistency.

We would also open ourselves to pressures from different countries in the world to alter existing treaties, and we would become a target of attack by all of those who are opposed to various governments in various conflicts occurring everywhere in the world. In short, we would lose our neutrality to the many ongoing conflicts in the world and become indirectly involved parties.

Therefore, I think the basic policy should be one of neutrality, which is also best reflected in the development of comprehensive legislation. As Congressman Hughes has expressed here, our national policy would apply equally to all countries in the world, without having the United States taking a political position in an internal conflict and finding itself embroiled in a variety of such conflicts all over the world.

Thank you, Mr. Chairman.

Senator TRIBLE. Thank you, sir.

Professor Rice.

STATEMENT OF PROF. CHARLES RICE, PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL

Mr. RICE. Thank you, Senator.

I would like to submit at the close of this statement a letter to me from Samuel P. O'Reilly, who was mentioned before, who was in the Post Office in 1916 and who has serious concern about being extradited if this treaty should be adopted.

I will also submit statements that are being sent to me—I will receive them tomorrow—from two legal authorities in the Republic of Ireland, Michael Farrell and Kader Asmal. The latter is a black African who is a lecturer in law at Trinity College in Dublin, and he has a unique perspective on the problem.

As I have explained in my statement, I think the treaty suffers from three defects. First of all, it is overly broad, reaching nonterrorist defendants. Second, it abrogates a function which is being performed adequately by the judiciary, under the wanton crimes exception, which I think would answer, Senator Eagleton, most of the questions that you raised. I would be happy to discuss that

later on. The third problem is, I think we tend to overlook that the basic rationale for this treaty as stated by Mr. Sofaer is that the political and legal system in Northern Ireland is fair.

It also implicitly involves the premise that there is in fact no authentic political revolt there. Now, it seems to me that the proponents of the treaty have the burden of proof on these issues. What I find disturbing is that there does not seem to be here the attention to requiring the gathering of evidence that would be appropriate to require them to sustain their burden of proof and to examine sufficiently the opposite view.

When I talk about the opposite view, I am not, of course, talking about the view that supports paramilitary activity. I am talking about the view as to the fairness of the legal and political system there and the question of whether there is in fact an authentic political revolt.

I suggest, as I suggested in the testimony, that it would be very appropriate for this committee to hear, or some other committee to hear, witnesses from Northern Ireland. We are secondhand witnesses, but the committee should hear expert firsthand testimony from people over there, who are available in abundant numbers to testify, to give what Father Dennis Fall has described as the worm's eye view of what it is like to live under that system.

Sean McBride, who is the founder of Amnesty International and the former foreign minister of the Irish Republic, is anxious to testify on this treaty. He opposes paramilitary activity. I agree with him on that. I think the political remedy is what should be pursued.

But at the same time, it must be recognized that there is an authentic political rebellion going on over there. It is not what Judge Sofaer called mere criminality. And Mr. McBride points out—and I have attached his letter to my testimony—that:

Partition has led to an ongoing insurrection situation which has disrupted the whole political and economic life of the country, and it has caused a great many casualties. In Northern Ireland, unarmed civil rights demonstrators have been killed by British military forces in the course of peaceful demonstrations.

Unarmed Republican suspects have been shot on sight by British forces. Many sectarian and political assassinations have been carried out either directly by the British forces or have been instigated by British secret service agents. British-appointed judges have justified the operation of police and military assassination squads in Northern Ireland.

Some Irish Republicans have sought shelter from harassment or from an unjust judicial system in the United States as a result of this situation. None of these events, he concludes, "is in any way connected with international terrorism."

I did not say that. That is Sean McBride who said that. I think the committee ought to hear him, or, of course some other committee if this committee cannot hear noncitizen witnesses.

This committee or another ought to hear, for example, legal experts, counsel who have participated in the Supergrass trials, who could tell you about the situation where they can arrest you on mere suspicion, where they can hold you for 7 days without charge, where you cannot see a lawyer for 2 days, and where the cops can be present when you see your lawyer, and where they can remand you without charge for 2 years—that is apart from the Diplock courts; that is not really a question of the jury—and where they have the unbridled power to search your homes.

And if I may conclude, one of the most obnoxious elements in the whole situation is pointed out by Father Raymond Murray, an opponent of paramilitary activity. This quote, with which I will conclude, illustrates the fact that you are dealing with an authentic political rebellion over there and this paramilitary activity, with which I disagree, is a symptom rather than a cause of the problem. The quote says:

They saw the British Army entering their homes night after night, insulting the womenfolk by foul and filthy language, tearing down the holy pictures from the walls with insulting words about Our Lord, the Blessed Virgin, and Our Holy Father the Pope.

They were endlessly searched and frisked and made to stand in search positions or lie on the pavements of their own streets. If some of these deprived youngsters threw a stone or made a rude gesture or used a foul expression to their tormentors, or if they got involved in paramilitary activity and took more serious action against their oppressors, they had to suffer the full vigor of emergency laws: ill treatment, dragged before courts, given the maximum sentence.

I merely hope that, whatever happens, you will not presume to deal with this treaty without going there, seeing the oppressed people. Do not stay in the Culloden Hotel or in the homes of the Ascendancy. Visit the oppressed people. They will welcome you with open arms. Live with them and find out from the worm's eye view what this thing is really about.

Thank you. [Applause.]

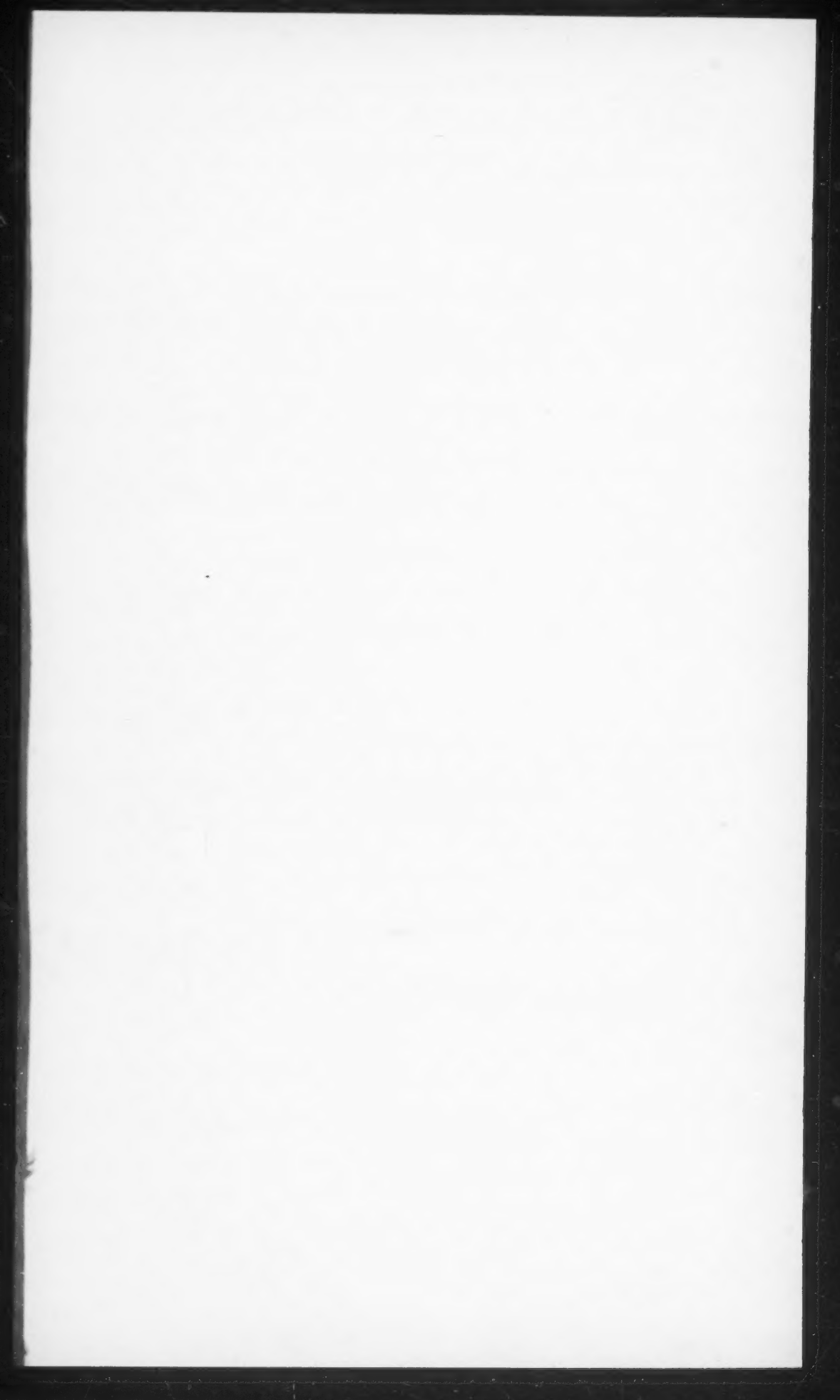
Senator TRIBLE. Gentlemen, we thank you for your thought-provoking statements.

We will recess and reconvene at 1:30. We would invite and hope you would return at this time. I know my colleagues and I would have questions to ask you at that time.

Senator PELL. Mr. Chairman, before adjourning, if we do not finish up today will we be able to go over to another day?

Senator TRIBLE. It is the intention of the Chair to complete these hearings today.

[Whereupon, at 12:36 p.m., the subcommittee recessed, to reconvene on the call of the Chair.]



UNITED STATES AND UNITED KINGDOM SUPPLEMENTAL EXTRADITION TREATY

TUESDAY, OCTOBER 22, 1985

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met at 9:33 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Paul S. Trible, Jr., presiding.

Present: Senators Trible, Evans, Pell, Biden, Cranston, Dodd, Eagleton, and Kerry.

Senator TRIBLE. The third session of the United States-United Kingdom Supplemental Extradition Treaty hearing will begin.

Congressman Fish, you are invited to come to the witness table. You are our first witness today.

Mr. Fish, you are invited to read your statement or to summarize it. We will place your entire statement into the record.

STATEMENT OF HON. HAMILTON FISH, JR., A U.S. REPRESENTATIVE IN CONGRESS FROM NEW YORK

Representative FISH. Thank you, Mr. Chairman. It is quite brief. I would like to thank you and the Committee on Foreign Relations for giving me this opportunity to testify today concerning the proposed supplementary extradition treaty with Great Britain. I certainly commend you and the committee for fully exploring the ramifications of this proposed treaty.

Mr. Chairman, international terrorism has taken an intolerable toll of innocent lives. Its hallmark has been the massive destruction of private and public property. There is an obligation, moral and rational, to protect the innocent from terrorism's indiscriminate and premeditated violence.

International conventions now provide for the extradition of criminals who commit wanton acts of violence, such as hijacking, genocide, hostage-taking, and torture. These heinous crimes cannot be excused by any civilized nation, and there should be no political asylum anywhere for those who commit them. In the aftermath of the *Achille Lauro* hijacking, I hope that the United States will vigorously pursue international cooperation with respect particularly to harboring terrorists. Those nations who refuse will name themselves accomplices to terrorism by refusing to go along with this international effort.

Mr. Chairman, as the ranking minority member of the House Committee on the Judiciary, I appear before you to express my disapproval of the proposed treaty before you.

My objections are, first, that it is too broad, both as to the offenses listed and in the far-reaching changes it would effect in existing law with respect to retroactivity and the applicability of the statute of limitations. Second, I suggest that if a change is, indeed, determined to be needed, a legislative response would be far more appropriate and uniform. Third, I question whether we should be placing our stamp of approval on the judicial system in Northern Ireland.

Mr. Chairman, the political offense exception is a reasoned doctrine of American and international law. If the subject of an extradition request committed the offense with purely political motives, the extradition request may be denied. The current criteria for allowing the political offense exception lies in the hands of our courts. United States courts have held that a political uprising is taking place in Northern Ireland and the individuals involved in the extradition cases were members of political groups acting in furtherance of that uprising.

The facts in each case determine the applicability of the political offense exception. I question whether we want to practically abolish the political offense exception as the proposed supplemental treaty would do.

In fact, abolishing the exception is certainly the main purpose of this measure.

Mr. Chairman, the list of the crimes in the proposed treaty is too broad. As many of my colleagues have attested, there are a multitude of persons in the United States who would now face extradition undeservedly as a result of this treaty's ratification.

This results from the fact that it is retroactive and lacks a statute of limitations. Indeed, these are major flaws. Retroactivity presents serious constitutional issues, and the effect of the language with respect to the statute of limitations would be simply that none would apply, as the law of Great Britain would apply, and it is silent as to a statute of limitations for these offenses.

If, in the judgment of the Congress, the exception should be revisited, a preferred approach would be legislation applied to all persons sought for extradition. The treaty before you applies only to persons sought by the British Government. I believe it is essential that our system of justice be perceived by the world as treating all international defendants equally. If we do not appear consistent and uniform, we will be sending mixed signals to the terrorist communities, which I believe would be a mistake.

I therefore recommend that the Congress take note of the terrorist acts which cannot be justified politically, and a beginning might be to look at those listed in H.R. 2151, the Comprehensive Crime Control Act of 1983, and isolate certain acts from the political offense defense uniformly in all extradition requests. A legislative approach, I believe, is far superior to this piecemeal, treaty-by-treaty basis.

What specifically alarms me in this case, Mr. Chairman, is that the supplementary extradition treaty creates the appearance that the American judicial system is in a comfortable and supportive relationship with the British judicial system as it operates in Northern Ireland under the so-called Emergency Powers Act.

Members of the committee, I ask that you take a long look at the presumption underlying this treaty; namely, that the judicial process in Northern Ireland provides fair treatment.

The Emergency Powers Act now in effect in Northern Ireland was originally instituted by the British for the same reasons given for the institution of this treaty: As a response to the terrorism and violence in Northern Ireland. But it has become an instrument of oppression against fair and moral political opposition. The heritage of law, a precious gift of England to so many English-speaking judicial systems throughout the world, has apparently been set aside by Great Britain in Northern Ireland.

Mr. Chairman, I visited the north of Ireland. I was appalled, as anyone would be, at the violence I saw there—the violence of the Ulster Constabulary as well as the violence of the Provisional IRA.

As a lawyer, I was even more appalled and offended at the abuses that I saw in the legal system. In the Diplock courts, there were wide powers of arrest, detention, search, and seizure. The right to a trial by jury had been abolished as cases were heard by a single judge; accused persons often faced physical and psychological coercion; and a person charged with an offense had no right to bail and could be detained indefinitely. In the last few years, there have been mass trials of up to 75 defendants at a time, in which one or more supergrasses, or informants, figured prominently. In these cases, the word of one informant, protected by Government immunity, was enough to convict without further evidence.

In the United States, this would amount, Mr. Chairman, to a loss of constitutional rights under the 1st, 4th, 5th, 6th, 8th, and 14th amendments. I ask, can we willingly be a party to the enforcement of these laws under these conditions?

Mr. Chairman, I would like to refer to a document dated 1978, August-September, which is a report of the House Committee on the Judiciary of a trip that was taken to Northern Ireland in 1978. It is fairly extensive, over 600 pages. But I refer your staff, if they wish to have a ready reference, to the appendix, which includes the laws and Royal Commission reports in force at that time: the Diplock Report of December 1972, Northern Ireland Emergency Provisions Act of 1973, the Lord Gardiner Report of January 1975, the Northern Ireland Emergency Provisional Amendments of 1975, the Northern Ireland Emergency Provisional Act of 1978, as well as reports about human rights in that country by Amnesty International, the Bennett report, and others.

The purpose of this volume, in part, was this compilation of all the relevant matters that went into this analysis of the judicial system. It would take a long, long time to get into detail this morning.

As an attorney and as a lineal descendent of the system of justice from Great Britain, I have to express my deep regret at what has happened. The state of the judicial system in Northern Ireland is a problem we cannot ignore.

To cooperate with the British through the ratification of this treaty would be a grave injustice to many on both sides of the ocean. Can we in good conscience extradite individuals to such a judicial system? Can we indeed put our stamp of approval on such a system?

Mr. Chairman, if we decide there is a need to reform our extradition process, the place to begin is here in the Congress. Let us address these problems for all nations through comprehensive legislation. I urge you not to ratify.

Once again, I thank you for this full and thorough inquiry into this issue.

Senator TRIBLE. Thank you, Congressman Fish.

Senator Eagleton.

Senator EAGLETON. Thank you, Mr. Chairman.

Mr. Congressman, would you pull your microphone closer so that I can hear you a little better?

Do I take it that it is your position that no PIRA individual should be extradited to Northern Ireland because of the existence of the Diplock procedures?

Representative FISH. No; that would not be the case, as I understand the present state of the law. Having reviewed certain recent cases where the defense of political offense was raised, it is apparent the court goes through an analysis of the specific actions taken—was this an action that you would expect in such a political conflagration as is going on in that country or was it beyond that? Was there hostage-taking, was there mayhem, was there deliberate, indiscriminate killing, and so forth.

Where they decided the latter was not applicable, they granted the exception.

So I think that on a case-by-case basis we are applying our law first.

Now, the reason I mentioned the judicial system is simply because it was something I made a study of; I'm more familiar with this and more disappointed in it. I think that when you look at the proposed treaty, it really virtually abolishes the political defense. Then, instead of looking at the fact pattern, as an American court currently does, you do say that you are going, in all cases, to rely on the system of justice, the Diplock courts.

Senator EAGLETON. You are not suggesting that we change what is the body of international law called the Doctrine of Non-inquiry, that is, we do not, and no nation, inquires under international law into the due process procedures of the requesting nation? That's the settled body of law.

Representative FISH. Well, I'm saying that you don't reach that doctrine if you don't pass or ratify this treaty. Correct.

Senator EAGLETON. Some of the professors who will testify later want to change that body of law and go to a doctrine of affirmative inquiry, where we would make a judgment about every nation as to how its procedures are before we would return an individual.

But the doctrine is settled unless we unsettle it—it is noninquiry.

Representative FISH. Right, and I leave that to the wisdom of this panel. But I don't think that you reach that issue here if you simply do not ratify.

Senator EAGLETON. Well, for instance, we reached that issue in the *Quinn* case.

Are you familiar with the *Quinn* case? He is the letterbomber. I will just give you a few highlights of what *Quinn* was alleged to have done.

Representative FISH. Yes; I have that here.

Senator EAGLETON. He left his fingerprints all over the bomb. He is both a bomber and a negligent bomber.

He mailed a letter bomb to Bishop William Tickle, in London. The bomb was placed in the Bible. His fingerprints were found on the wrap.

He letterbombed the Crown Court Judge John Hazely Buzzard. When Buzzard opened the parcel, it exploded, causing injury to his face and hands and the loss of parts of two of his fingers.

Then he mailed a bomb to Sir Max Aiken, chairman of the Daily Express newspaper. The guard took the bomb and his fingerprints were found on the bomb.

Then he placed a bomb on a loading platform at the Aldershot Railway Station in Hampshire County. That bomb was defused.

Then he placed a bomb—all of these have his fingerprints on the packages—at the Kings Arms Pub, and then he placed another bomb at the Charco Grill. So he is a rather frequent, not terribly clever, bomber.

Now, we face that case. Quinn came here. They wanted to extradite him back to Northern Ireland.

Now, what about Quinn? In your opinion, should Quinn go?

Representative FISH. Yes, he should. I distinguish this case from the other recent examples, the *McMullen*, the *Mackin* and the *Doherty* cases. You are talking here about a fringe of the PIRA who do support terrorist activities.

Senator EAGLETON. Would it be a fair deal if we rewrote some laws here to say, like the European Convention, that bombing is out. The European Convention, signed in 1978, says bombing is a no-no. Article 1(e): An offense involving the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb—you extradite him.

Wouldn't that be in today's commonsense world the rational thing to do, to say look, a bomber, bombs get innocent people? Can't we at least declare bombing out and extradite, as the European Convention calls for, all bombers?

Representative FISH. Senator, I hesitate there.

To me, sending a bomb in the mail to a clergyman, bears little relationship to your political—

Senator EAGLETON. Well, suppose the clergyman is head of the Royal Order of whatever it is called of Orange? It used to be Mr. Smythe.

Representative FISH. Then I think you would look upon this in the context of virtually a civil war—a military side of a political situation.

Senator EAGLETON. I agree there is a civil war in Northern Ireland. I think they meet the standard of civil war. We will get into, with other witnesses, other civil wars, whether there is a civil war in Spain and whether there is a civil war in certain other parts of the world.

I agree and will stipulate there is a civil war in Northern Ireland. Now, can't we say that bombing is out, just as the European convention, across the board, says a bomber will be extradited and specifies even parcel bombs, whether you mail it to Reverend Smythe, Bishop Smith, Judge So-and-So, General So-and-So, or Aunt Jemima?

Representative FISH. No; I don't think you can be that flatfooted and say to anybody involved in a civil war—your words—that you're going to constrain him that he can do certain acts, but he can't do other acts.

Senator EAGLETON. Bombing is inherently risky in terms of what it might do to innocent people.

I was in Northern Ireland, too. I have spent more time in Northern Ireland than any Member of the United States Senate. I have been to Northern Ireland more times than any other Member of the United States Senate.

Two weeks after I left Northern Ireland—2 weeks after I left—on February 17, 1978, 12 people were killed and 30 were injured by a PIRA firebomb attack on a restaurant in County Down. They threw it in a public restaurant and slaughtered and killed 12 people and injured 30—including women and children. A firebomb.

Can't we say, as civilized individuals, as civilized nations, just as the European nations have said in their convention, that bombing of any type is so reprehensible to mankind that those who engage in it will be extradited?

Representative FISH. I think that the example which you gave would certainly qualify as a heinous act that would involve extradition. You are talking about civilians. You are talking about what I described as wanton, indiscriminate killing. But to say to a party to a civil war that you shall not bomb and not tell the other side that you cannot shoot, because you have the weapons, the firepower, I think it's just impossible for us sitting here to think of doing.

Senator EAGLETON. All right. One more question.

Congressman Biaggi, in his testimony, said that murder, he felt, should be an extraditable offense, all forms of murder. He thought murder itself was, per se, heinous and, therefore, in all instances extraditable.

That was his testimony.

Do you agree with Congressman Biaggi's testimony?

Representative FISH. I'd have to ask him what he means by murder.

Senator EAGLETON. Murder, first degree, premeditation and deliberation.

Representative FISH. Then you are talking about——

Senator EAGLETON. The premeditated and deliberate taking of a human life.

Representative FISH. You are talking about the squaring off of the Ulster Constabulary armed against the Provisional IRA armed, and you are going to call it——

Senator EAGLETON. He said all forms of murder. That was his testimony.

Representative FISH. I can't go that far.

Senator EAGLETON. You can't go as far as Congressman Biaggi?

Representative FISH. No; I don't think so in that respect.

The point is, sir, I think this is better left to the state of the law where it is, where the courts will say was the fellow whose extradition request we are considering, was this murder or was this in response to firepower from the other side?

Senator EAGLETON. The *Quinn* case was left to the courts.

Representative FISH. I can't answer you, Senator, if you don't allow me to.

Senator EAGLETON. The *Quinn* case was better left to the courts. Under your doctrine, that's where it was. It was left to the courts, and Mr. Quinn is still in the United States.

Representative FISH. Well, you and I certainly don't agree with every decision that our courts have ever come down on. As I say, the *Quinn* case is a different fact pattern from the others I mentioned, and presents a more serious problem.

I don't think that you can just use a word, undefined, such as murder, unless you are willing to specify exactly what you are talking about.

Death will result from parties being at war through civil war, civil conflict. There is no doubt about it.

Senator EAGLETON. Final question: Would you accept as a body of extraditable crimes, not susceptible to the political offense exception, that body of extraditable crimes defined by the European nations in their convention of 1978?

Representative FISH. I am afraid I can't answer that. I would be glad to look at that and submit my opinion to the committee, if that is your desire.

[The information referred to follows:]

CONGRESSMAN FISH'S WRITTEN RESPONSE TO SENATOR EAGLETON

Question. Would you accept as a body of extraditable crimes, not susceptible to the political exception, that body of extraditable crimes defined by the European nations in their Convention of 1978?

Answer. No, I would not accept the list of crimes outlined in Articles 1, 2, and 13 of the European Convention. Although I agree with many of them—hijacking and attacks on heads of state—I feel that to outlaw all use of automatic firearms, all instances of kidnapping or hostage-taking may not reflect the realities of war. In a situation such as the one in Northern Ireland, where a civil war is going on, to extradite for all uses of firepower "if this endangers persons" is unrealistic. I repeat that acts of violence are properly considered in the context of the total scene by U.S. Courts. I would note that many of the nations signatory to the Convention have also filed reservations.

Senator EAGLETON. Do you have any trouble with hijacking?

Representative FISH. No.

Senator EAGLETON. That is, per se, extraditable?

Representative FISH. That's right, and we are a party to a convention—

Senator EAGLETON. Even without the loss of human life?

Representative FISH. We are party to conventions in that respect today.

Senator EAGLETON. And you are satisfied with that?

Representative FISH. That's correct.

Senator EAGLETON. One of the professors who will testify later isn't. He calls it "commandeering." He can think of instances where you commandeer.

Representative FISH. I approach this, Senator, from the point of view of my—I don't think you were in the room when I started my testimony—I think we are just on the threshold of dealing with international terrorism. I think you would agree with me, and many of your colleagues have addressed this issue, that this is a threshold problem today in the world we live in. We have to move

strongly toward an international response to terrorism, and one of the first manifestations of it has been hijacking.

Hijacking is only one piece of it. It happens to be the focus of attention since the TWA incident last summer, and it is going to get a lot worse. Certainly I would put that in this category.

Senator EAGLETON. Finally, what about kidnaping or hostage-taking?

Representative FISH. This has been the line drawn by our courts, where hostages were not taken. It was clearly a plus for the application of the political offense doctrine.

I think it would depend on the purpose for which hostages were taken, and that's the way the courts have considered it today.

Senator EAGLETON. So, if there is clean hostage-taking, we don't extradite; if there is dirty hostage-taking, we extradite?

Representative FISH. Well, there's a difference. If you or I could imagine that you were involved in such a situation in Northern Ireland, and you wanted to escape from the police surrounding whatever place you were in, you might well take a hostage for the purpose of effecting your escape, but not for any purpose beyond that.

Senator EAGLETON. What about kidnaping, for either ransom or return of another person?

Representative FISH. It is difficult to delineate that, again.

Senator EAGLETON. The European Convention does.

Representative FISH. Yes; I know it does.

You know, you call this a civil war, and here you are, taking the Queensby Rules and saying that you have a civil war but you can't do this long list of things.

Senator EAGLETON. Do you think there is civil war in Spain, in the Basque region?

Representative FISH. I suppose if you were a Basque—

Senator EAGLETON. Basques certainly believe so.

Representative FISH [continuing]. You certainly would consider that. Yes, sir.

Senator EAGLETON. Do you think there was a civil war in Greece at the time of the overthrow of the first Pappandreou, when the colonels came in?

Representative FISH. Those involved would think so. Yes, sir.

Senator EAGLETON. So there can be a civil war in countries that have the electoral process. The State Department says you can't have a civil war where you have the electoral process. I think they are all wet on that issue.

Representative FISH. Well, I made a reference to that but did not go into it at length because other colleagues have dealt with that.

But to say that just because you have a treaty between two democratic, stable countries, ipso facto you have one, democracy, and two, you have a justice system that you can respect and rely on, is pure nonsense.

Senator EAGLETON. Thank you.

Senator TRIBLE. Senator Evans.

Senator EVANS. No questions.

Senator TRIBLE. Senator Kerry.

Senator KERRY. No questions.

Senator TRIBLE. Thank you, Congressman Fish.

Mayor Flynn, would you come to the witness table.

Senator KERRY. Mr. Chairman, may I have the honor of introducing the next witness?

Senator TRIBLE. You may, indeed, Senator Kerry.

Senator KERRY. Thank you very much.

I am very pleased to be able to welcome a very close personal friend of mine, as well as our great mayor of the city of Boston to testify on this supplemental treaty.

The mayor has written extensively on the subject of Northern Ireland, and I would ask for unanimous consent that a number of his articles be submitted for the record.

I think that if my colleagues read these articles, which address the human dimension of what is happening in Northern Ireland, they will be impressed by his knowledge of the personal dimensions of what is involved right now in that tragic land.

I think they document his ability, as a mayor, to be able to address those sides of the concerns that many people have with respect to this treaty.

In addition, the mayor is going to be publishing a book on Northern Ireland which addresses specifically the human dimensions and the consequences of current British policy with respect to social, economic, and political civil rights abuses in that area. His concerns about Northern Ireland predate his tenure as mayor, though as mayor he acted immediately upon taking office to open an office of human rights, which addresses many of the concerns that people have in Boston. He has spoken out continually on problems with respect to human rights in South Africa, Poland, and the Soviet Union, and I think in so doing and by being here today he exhibits tenacious adherence to the strongest American values, which I think all of us share.

So I am delighted to welcome him here today and to have his testimony.

Thank you, Mr. Chairman.

Senator TRIBLE. Senator Kerry, we thank you for those good words.

Mayor Flynn, you are most welcome here today. We look forward to your testimony.

Your full statement will be made a part of the record. You are invited to read that statement or to summarize it in pertinent part.

STATEMENT OF HON. RAYMOND L. FLYNN, MAYOR, CITY OF BOSTON, MA

Mayor FLYNN. Thank you, Senator and members of the committee.

Let me at the outset say that I was tremendously impressed in hearing the dialog between the great Senator, Senator Eagleton, and Congressman Fish.

I'm wondering why Senator Eagleton is here when the Cardinals are playing the Kansas City Royals in Missouri. [Laughter.]

I am pleased to have this opportunity to appear before the Senate Foreign Relations Committee to state my opposition to a portion of the proposed treaty which I deeply believe to be against our national interest.

Stated directly, the members of this committee are being asked by the State Department at the behest of a foreign government to reduce the authority of our Federal courts on matters related to the extradition of individuals from the United States to the United Kingdom, specifically by eliminating the political exception provision in its entirety from our treaty with that government.

I would like to emphasize that, by no means, would I oppose the thrust of the entire amendment. For example, action by Congress to strengthen our efforts against such internationally outlawed acts as airline hijacking, the kidnaping of political officials, and murder, and so forth, would be a much more effective approach than dealing with every separate treaty between the United States and other countries.

But those corrections can and should be made by the Congress without assigning undue authority over to the executive branch in making separate arrangements with every country.

The current proposal would make for both bad law and an unwise approach in the conduct of foreign policy.

As you know, beginning 140 years ago, it was decided by our Nation that a political exception provision would be standard in all treaties with foreign governments. Most importantly, it was left to an independent Federal judiciary to decide which offenses qualified for that protection based on the merits of each individual case.

But now, without sufficient reason, you are being asked to ignore what has, indeed, been a workable and just system and to establish a dangerous precedent which could well lead to the end of the political exception provision in treaties with other nations, either by this administration or by future administrations.

There is a well-known American adage which states: "If it isn't broken, don't fix it."

I believe that this adage should be particularly useful to the conservatives and liberals alike in protecting what has been a long-standing, workable, and important part of the fabric of the American legal system.

The fact of the matter is a review of the records of the Federal courts will show you individuals guilty of serious offenses have indeed been extradited by the United States to Great Britain and other countries on a regular basis. Those cases are judged on the merits by our independent judiciary with the political exception provision included. Only on four occasions since the end of World War II have the U.S. courts granted the political exception.

As the mayor of Boston, a city known proudly as America's "Cradle of Liberty," I take pride in the role Boston and Massachusetts played in creating an American Republic, based on a rule of law system, that has stood the test of time as a protector of individual liberty.

We helped create a system of government that was, indeed, different in terms of political and legal institutions from that of Britain or any other country. We had sound reasons for doing so then, and an objective analysis by this committee of the lack of a legal system respecting due process rights in the British-created and supported entity known as Northern Ireland, underscores how fortunate we are in our country.

Such an analysis, I believe, would make this committee more hesitant about ending a long-standing American legal principle, a step that would lead the United States to embrace, in effect, the fundamentally flawed criminal justice system in Northern Ireland.

Indeed, to ratify this amendment would mean that the United States is effectively intervening in the conflict in Northern Ireland, clearly on the British side. It would only contribute to the turmoil because it would strengthen the current British Government's view that the conflict is primarily a security problem rather than a political one, to be solved by serious structural reform of Northern Ireland, reflecting the democratic rights of all the Irish people throughout Ireland.

The past 15 years have made it clear, with or without this treaty amendment, that official repression in Northern Ireland is not the answer.

This is why eliminating the political exception provision would not serve the interest of the United States, the British, or the Irish. To ratify the amendment would mean that, instead of engaging in serious reform, the British Government could continue with business as usual in Northern Ireland.

I recognize that there are members of this committee contemplating support for this whole amendment out of the best of intentions. But, ironically, rather than combating terrorism, the enactment of this amendment in full would have the effect of aiding terrorism.

Efforts directed at opposing terrorism in order to be successful must also take into account the terrorism of the forces of state, as well as the terror of paramilitary groups. Both forms of terrorism must stand condemned by our Government, and none must be given quarter, no matter whom the perpetrator or excuse rendered.

Accordingly, a significant body of evidence is available to this committee demonstrating that the violence of the British security forces against unarmed Catholics in Northern Ireland, along with the denial of due process rights, amount to a very real form of official terror, as well as an ongoing source of Catholic alienation from the institutional structures of Northern Ireland.

The denial in Northern Ireland of trials by jury, the extensive use of paid informants, the absence of probable cause proceedings, added to the number of unarmed Catholics killed by British security forces, does not serve to present a system based on a rule of law as we know it, and as the United States State Department has incorrectly claimed, I might add.

Indeed, I respectfully suggest that a review of the criminal justice system in Northern Ireland should be undertaken by this committee before a vote on this exemption proposal is considered.

For the United States Senate to even indirectly support the perpetuation of a legal system in Northern Ireland denying due process of law through the approval of this proposed amendment in its entirety, would only contribute to the conflict in Northern Ireland. Just as importantly, the removal of the political exception in its entirety would abrogate a long-standing and workable U.S. legal principle on extradition.

We should not lend the prestige of the United States and our respect for due process of law to a system in Northern Ireland where due process of law is, in fact, denied.

Such an action would be unnecessary and an affront to our American republic.

Thank you, Mr. Chairman.

Senator TRIBLE. Mayor Flynn, thank you very much for your statement.

Mayor Flynn, would you agree with the following statement, and let me quote:

We see in those parts of the community where the Provisional IRA are more active the spread of a foul social concern. We will always recognize this evil for what it is and call it by its only name—murder. We say to the Provisionals you are not Irish Republicans. You are extremists, who have dishonored and are dishonoring the deepest ideals of the Irish.

Mayor FLYNN. Any form of terrorism, Senator, whether it be by any paramilitary organization—the IRA or the UDA—or terror by security forces—must be condemned by any right-thinking government. There is no question about it.

But for anybody to suggest that denying people due process, taking people's civil and human rights away from them, denying people rights that they are entitled to by creation, is the solution of ending terrorism, they are wrong.

Sir, I point out that those kinds of denials continue terrorism, and when the British Government recognizes that in Northern Ireland, I think they will find out that terrorism will not be at the center stage as it is here today.

Senator TRIBLE. That statement, by the way, is a statement made in 1981, by John Hume, who, of course, is the leader of the Social Democratic and Labor Party in Northern Ireland.

You make the point that terrorism in all forms should be condemned, that terrorism, both of the paramilitary groups and of the forces of the state should be condemned by our Government.

But isn't it true that, under the present state of our law, PIRA members who commit violent acts, UDA supporters who commit violent acts, and members of the Royal Ulster Constabulary who commit violent acts in repressing the PIRA and the UDA can all escape prosecution by fleeing to the United States and by pleading the political offense exception to extradition?

How is the granting of asylum to these individuals in any way condemning terrorism? It would seem to me that it would be condoning the acts that you suggest ought to be condemned.

Mayor FLYNN. I don't think that's the case at all, Senator.

I think that we have a system in this country that, in fact, can deal on a rational basis where due process, where human rights, civil rights, and legal rights are extended to all parties. I have great confidence in our judicial system, and I have great confidence that the Congress of the United States can deal with these issues as well, rather than going around and amending treaties.

I have confidence in the system. It has stood the test of time, repeatedly. It stood the test of time in the Civil War in this country, where President Lincoln did not take away people's civil rights and human rights.

Senator EAGLETON. I think the witness is mistaken on that.

I will at a later time put in a memo on what President Lincoln did during the Civil War. The writ of habeas corpus was suspended.

Mayor FLYNN. I agree with that. I agree.

Senator EAGLETON. The great writ and other acts were taken by President Lincoln, the most venerated President in the United States, during the American Civil War.

I will do it at this time.

I ask unanimous consent that a memo on President Lincoln's activities taken during the Civil War be printed in the record at this point.

[The information referred to may be found in the appendix.]

Senator TRIBLE. Without objection, it is so ordered.

Mayor FLYNN. Thank you, Senator. I appreciate that comment.

Senator TRIBLE. Please continue, Mayor Flynn.

Do you wish to continue with your response?

Mayor FLYNN. No. I am done.

Senator TRIBLE. Since we are correcting the record, I would also point out, Mayor Flynn, that the preliminary premise of your statement is that we ought not to take the determination of what is a political offense away from the courts. I would tell you that this Congress and this Senate have done that on at least three occasions; that the present extradition treaties in force with Mexico, Colombia, and the Netherlands, all provide that a determination of what constitutes a political offense is left with the executive branch and not the Congress.

I would suggest that all those nay-sayers on the present treaty who are advancing this argument were silent when the Congress and the Senate approved those treaties without dissent.

Mayor FLYNN. Sir, I would respond by saying that if this country is going to be a country that stands for human and civil rights, whether it be in South Africa, we have taken strong positions, the first major city in America, Boston, whether it be in the Soviet Union, wherever, then I think we ought to be consistent across the board, and I would expect our Federal Government to be consistent across the board as well, and that includes Northern Ireland.

Senator TRIBLE. Mayor, there are now 300 members of the PIRA jailed in Northern Ireland for murder and for other violent offenses. Would your views on this treaty change if they escaped en bloc and fled to Boston?

Mayor FLYNN. Oh, I have confidence that our system of justice in our country would deal expeditiously with those cases and we could bring those people to rightful justice. I don't have a low regard for our judicial system.

Senator TRIBLE. Senator Eagleton.

Senator EAGLETON. Mayor, I wish to emphasize that I agree strenuously with the first two paragraphs of your statement on page 5, about the violence on the other side: "Accordingly, a significant body of evidence is available to this committee demonstrating that the violence by the British security forces against unarmed Catholics in Northern Ireland, along with the denial of due process rights, amounts to a very real form of official terror," et cetera. I subscribe to the thrust of your first two paragraphs.

I ask unanimous consent to put into the record at this point two articles by Mayor Flynn, one from my paper, the St. Louis Post

Dispatch, "Ireland's British Problem," March 15, 1985, and from the Christian Science Monitor, Tuesday, October 2, by Raymond Flynn, entitled "Toward an Anglo-Irish Peace Process," and then a minimal, and I call it minimal, Congressional Research Service statement that tried to analyze the violence on the other side, and the CRS threw up their hands and said that they couldn't find statistics, that the best they could find was from the Irish National Caucus, and included the statistics from the Irish National Caucus.

I ask that those be put into the record.

[The information referred to may be found in the appendix.]

I also ask, Mr. Chairman, that a staff study be made to try to get from all sources, from the Republic of Ireland, from the officials of Northern Ireland, from whatever reliable source, data, statistics, and information pertaining to the violence on the other side.

It seems to me, as long as the so-called troubles have gone on, and the beginning date of the most recent troubles is 1969, that somewhere in the world, from Amnesty International, perhaps—I don't know where—that this committee could get some accurate data as to the nature of violence on the other side. We have specific data as to PIRA violence. We have enough of it to fill volumes. It seems to me that we ought to have something in the record of the violence on the other side, and I would hope that the staff could pull that together for us.

Senator TRIBLE. Without objection, we will ask the staff to search out and report on violence on all sides.

In terms of the prolific writings of our friend, Mayor Flynn, we will only introduce into the record one copy of each article that he has authored.

Senator EAGLETON. If those are duplicates, leave mine out.

Senator TRIBLE. Senator Kerry had asked that a number of articles be included in the record that were by the mayor.

Senator EAGLETON. If mine are duplicates, then leave out mine. But footnote the one that appeared in the St. Louis Post-Dispatch. They will like that.

Senator TRIBLE. But we will hold the record open for any other writings that come along.

Senator EAGLETON. Thank you.

Mayor Flynn, is it your position that as long as the Diplock procedures are in place, no PIRA individual should be extradited to Northern Ireland?

Mayor FLYNN. I would say, Senator, that it's a bad system to me. I cannot speak with great authority—

Senator EAGLETON. Let's stipulate that it's a rotten system. It is a rotten system that does not track in any reasonable sense with what we conceive to be due process under the American system. We will stipulate for the record that it stinks.

Is it your position that no PIRA fugitive who flees to the United States for whatever crime should be extradited back to Northern Ireland because of the Diplock system being in place?

Mayor FLYNN. I can't tell you with great authority about an individual case or that particular situation.

Senator EAGLETON. Let's say it's a really bad one. Really bad. What about that restaurant bombing that I told you about. You were here. It occurred 2 weeks after I was in the north. They

slaughtered 12 people, and injured 30. They firebombed a restaurant.

Suppose that guy, that coward, that murderer, or a group who did that, suppose they came here? Suppose they came to Boston?

Mayor FLYNN. I think I would have confidence, Senator, that our system of government as we have it here in this country would be effective enough to deal——

Senator EAGLETON. No, no. We couldn't prosecute them. There is no long-arm statute in that respect. They couldn't be prosecuted in Boston.

Mayor FLYNN. In our Federal courts?

Senator EAGLETON. No. They would be free as the breeze. They could attend parades.

Mayor FLYNN. Well, I would think that our system of government and our judicial system in the United States would have effective force of law to give those individuals due process, try to understand, to see whether or not there is justification for extradition and deal with it the way we would deal with it with any other foreign government.

Senator EAGLETON. Did I hear you say that there could be, for some horribly heinous offenses, extradition back to the north, even though Diplock is in place?

Mayor FLYNN. Well, again, it's a catch-22 position.

I think the real issue here is whether or not this Government is going to exercise the authority that it has in trying to convince our good friend and ally, Great Britain, to deal with the situation in the northern part of Ireland in a rational way, and dealing with the situation in a rational way is giving people their constitutional, human, and civil rights.

Senator EAGLETON. Well, let the record note that the mayor does not want to answer the question.

Mayor FLYNN. Thank you.

Senator EAGLETON. And I don't blame you for not wanting to answer it, Mayor, because you're taking the position that Diplock is heinous, horrible, et cetera, yet you know if these thugs, these murderous thugs, come to the United States, you don't want them around your town, and you know the American system can't try them for anything. We can have individuals who can encourage them to come over and pay for them while they are here, and we are stuck with them. You wouldn't want that filth in your town. Who would want them? But some people here will harbor them.

So I don't blame you for not wanting to answer the question.

Now, you said terrorism begets terrorism. It does.

You said if Diplock went out, then maybe terrorism would subside because guys could get a fair trial up there.

You must know the trouble started in 1969. Diplock didn't go in until 1972. And I will put into the record the acts of terrorism that took place between 1969 and 1972, when Diplock was not in place. There were bombings, restaurants, the same old act.

In fact, I ask unanimous consent that we put into the record, Mr. Chairman, the acts of terrorism that took place even before Diplock went into effect.

Senator TRIBLE. Without objection, it will be made a part of the record.

[The information referred to may be found in the appendix.]

Senator EAGLETON. Now how about this, Mr. Mayor, and then I will finish up.

There are some crimes that civilized nations under the European Convention have said are so heinous, per se, that we are just going to extradite because of the very nature of the crime.

Let's take hijacking. The PIRA has not gotten into that yet. But let's take hijacking.

Do you think hijacking is so inherently heinous that it ought to be extraditable—the hijacker? Any kind of hijacker—PIRA, PLO, Cuban, any kind of hijacker?

Mayor FLYNN. Sir, you're right. For the Irish, that has not been an issue, to my knowledge.

Senator EAGLETON. They've gotten into kidnaping. They've gotten into almost everything but hijacking.

So what about hijacking?

Mayor FLYNN. I would say, How is the U.S. Congress dealing with hijacking in any other country?

Senator EAGLETON. There's a treaty on it.

Mayor FLYNN. Should the laws, Senator, be any different for the people of Ireland than they are for any other international terrorist or hijacker? Do you believe they should?

Senator EAGLETON. Oh, I agree with the treaty, that hijacking is, per se, extraditable.

When the PLO hijacks the TWA plane, extradite.

Mayor FLYNN. I would say, Senator, that the laws relative to hijacking should be consistent. I don't believe that there should be any exemptions or changes in treaties or changes in law, and I have confidence that the U.S. Congress can deal with that.

In addition to that, Senator, I know you said it was your last point that you wanted to make, and you raised a question, and I think it is a fair one, about acts of violence on both sides.

I'm surprised that the committee and everybody else down here doesn't have this documentation.

Senator EAGLETON. I'm surprised, too.

Mayor FLYNN. Yes. Here it is, as big as life, in front of me [indicating], and this came from the Irish Information Partnership. We have information here from Brussels, we have the European Court on Human Rights, which documents time and time again the number of violations—12 people killed by plastic bullets; 13 others, unarmed civil rights protestors shot dead by the British Army in a protest march in 1972, for which no officer was charged, and after which the commanding officer, in fact, was promoted.

I'm surprised nobody asked that question and I'm surprised that information was not available to this committee.

Senator EAGLETON. It will be made available and we will analyze it. It is instructed that a satisfactory, rational, and complete analysis of the violence on the other side be made a part of the record.

Here is my final question.

In order to respond to your question of consistency—you used the word "consistency"—suppose the United States just joins the European Convention?

Here is Europe, and these are civilized nations. They are our allies, NATO allies primarily. They have a convention about these matters. And so, to be consistent, we just up and join it.

Would you have any opposition to that, if we joined the European Convention on Extradition?

Now, I don't want to trap you. But if we do, we then take care of kidnapers, hijackers, and all those slobs, and we also take care of the bombers, because the European Convention says you can extradite, not having a political offense exception, if you use a bomb, grenade, rocket, automatic firearm, or letterbomb. You heard the *Quinn* case.

Mayor FLYNN. Yes.

Senator EAGLETON. Here, in the United States today, is this guy Quinn—the fingerprint letterbomber.

Don't you think the civilized world has a right to get rid of bombers?

Mayor FLYNN. I think that the civilized world ought to be able to deal with such a heinous situation as that, I clearly do. Again, the answer cannot be having two sets of rules, one applying to one part of the world and another set of rules applying to another part of the world. If we're going to be concerned about human rights as a government—and I think we ought to, and I certainly applaud our Government's stand in that regard—if we are going to be consistent in the area of human rights, then let's also include Northern Ireland. Let's not turn our back on Northern Ireland and let a system go on for years and years and years—a system run by a friend of the United States Government. We are a government that could exercise terrific influence with Great Britain and at the same time we virtually do nothing.

Senator EAGLETON. Thank you.

Mayor FLYNN. Thank you, Senator.

Senator TRIBLE. Senator Evans.

Senator EVANS. No questions.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Thank you very much, Mr. Chairman.

I would like just to point out and underscore what the mayor is saying, and I think it's a perception that I've expressed, and Senator Biden and Senator Dodd and others have expressed previously, that it's not that any of us in this process are trying to support adhering to a standard of behavior to which civilized countries ought to adhere to in order to deal with the situations which my colleague rightly condemns.

I think what disturbs a great many of us is what the mayor has expressed as a recurring theme in his comments about distinctions between countries.

Let me address the chairman's comments.

Consider Colombia and Mexico. Those are indeed treaties which have transferred considerable discretion to the President that happened before my time here, and were I to be called upon to consider both treaties now, I would approach them with the same attitude with which I approach this treaty. I don't think that was a correct decision, No. 1.

No. 2, they are clearly to be distinguished from this present document. Why? Because in those situations, the political offense excep-

tion was not defined as specifically as it is in this treaty. It was set for the executive to have great and broad discretion as to what might constitute a political offense. It, in effect, did not strip from the court or the executive the ability to be able to say this may be a political offense.

And it gets very tenuous.

My colleague is an attorney and a former prosecutor and he understands as well as anyone the slippery slope of definitions. Indeed it is conceivable there might be that one situation in which you could define where it was within the context of civil war, strife, and therefore somehow justifiable, who knows, and I think, therefore, a reluctance by some to shut the door absolutely.

But this treaty is different from that with Mexico, Colombia, and the Netherlands, because it sets our with specificity what does or does not constitute that offense, and, in addition to that, puts discretion in the hands of the executive to the degree that little, if any, discretion is left, after having taken those things away.

That is No. 1.

No. 2, those thing that are defined with specificity go beyond any definition that we've ever seen before.

When you start to say that the use of a firearm by a person with intent to resist, or damaging property with intent, you get into an entire category of discussion and of examination which is absent from any other treaty whatsoever. This is the Ireland exemption. This is the new treatment of the Irish situation, with specificity for this situation.

Those are real distinctions.

In addition, I would point out to the chairman for the record, if we are looking for consistency—and I think we ought to be—we have an extradition treaty with Germany which forbids our extraditing to any system that countenances imposition of a penalty imposed by a special court. Article XIII, an extradited person shall not be tried by an extraordinary court. Extradition shall not be granted for the enforcement of a penalty imposed or detention ordered by an extraordinary court.

So, in effect, our extradition treaty with Germany says we can't send people to a Diplock court system, which is an extraordinary court, and you can't send people to be penalized by a Diplock court system.

So, if we are going to look for consistency, or if we are going to say that our other treaties have any meaning at all, why should not the same situation that we apply to Germany apply to the situation in Northern Ireland?

I think those are the issues that are at stake here, and I think if we were to move more toward the European Convention, which would certainly make me a lot happier, we would be establishing a process which could be judged to be fair. And, second, we're still looking for the information that documents a list of extradition requests which have not been honored, a list of extradition requests which shows why this is so important.

Now, I know there are or two cases that occasionally slip through. I'm not going to argue with my colleague about the reprehensible letterbomber or about those kinds of actions.

Senator EAGLETON. Would you have extradited in the *Quinn* case?

Senator KERRY. Yes, personally.

Senator EAGLETON. It's a simple question. You heard my summary of the case. I'll give you the summary and you can read it.

Would you have extradited in the *Quinn* case?

Senator KERRY. Personally, yes.

Senator EAGLETON. Well, then, you would have extradited to a Diplock court.

Senator KERRY. But that's not the issue. Would I have extradited in broad principle?

Senator EAGLETON. You just spent a lot of time talking about the Diplock courts, but you would have extradited Mr. Quinn to a Diplock court.

Senator KERRY. No. I answered your question in the concept of an abstract "would I extradite him" under a normal extradition concept to a country that has a system. Would I extradite him for that offense? Yes. But that's not an answer to the question of whether or not I'd want to send him to the Diplock court system.

But I think we ought to be examining exactly what the status of that system is today and exactly what the status of the system of justice is in Northern Ireland, because I think that bears on our decision as a senate.

If the Senate is going to decide that we are going to make this an offense and change the structure of extradition, then I think we darn well ought to know exactly what those people are going to be subjected to. And there is enough evidence that has been put forth by each panel appearing before this committee that there is cause for concern.

I am not going to draw conclusions about that more than I have already, but I think this panel ought to try to do so in a form that allows us, if we're going to pass on this, to do so with a better sense of exactly what the consequences are.

So I'd like to see us try to get that kind of study.

[Pause.]

Senator KERRY. We do have it.

Senator EAGLETON. I think it's important not only to have an analysis of the Diplock system but also studies on the amount of reverse violence. We have abundant evidence on the PIRA. There is a lot of evidence out there on the other side that seems to be hidden—

Senator KERRY. Absolutely.

Senator EAGLETON [continuing]. And I think that ought to be in the record.

Senator KERRY. I absolutely agree with that.

No one here is trying to set up a situation which continues the violence or somehow enhance it or diminishes our ability to be able to deal with it. All we are trying to do, I think, is find a way to deal with it that people can judge is fair and judicious and appropriate within the context of our other treaties. I think it's the question of whether or not we are within that context that is most disturbing in this process.

Mayor FLYNN. Senator, I would point out that you make an excellent point.

If I accomplish nothing other than clearing the air here on the European Court on Human Rights, cases of Ireland against the United Kingdom, actual judgments of the European Court on Human Rights, this is all documentation that I would like to present to this committee [indicating]. I think it is important to have that information in making a fair determination of a very important change in the American legal system that this committee is considering.

I think it is very important to put that on the record so that when people are dealing with the issue, they are dealing with both sides of the issue and not just information that is filtered to them which is self-serving.

Senator KERRY. Can we have that included, Mr. Chairman?

Senator TRIBLE. I'm not sure there is a room large enough for the record of this proceeding, but, Mayor Flynn, we will make that, at the request of Senator Kerry, a part of the record as well.

Senator KERRY. Thank you, Mr. Chairman. I appreciate that.

I know the mayor's schedule is tight, so I will hold off on further questions.

Senator EAGLETON. Mr. Chairman, what I am after, I don't think I made it clear, is this. We can put what might be a couple of thousand pages as an appendix to the record, and it will sit in that room [indicating]. But what I would like the staff to do, with the help of the State Department, the Congressional Research Service, and any other body, is to pull together, in manageable form, for every member of this committee to be able to read, a document of reasonable length which summarizes or analyzes the violence on the other side, just as we have all of these documents and materials on the PIRA.

Mayor Flynn's books are large, and not one member of this committee is going to bother to read those books. We need something in manageable, distilled form.

Senator KERRY. I agree with my colleague and I would like to see us do that, providing it contains both. But I think the bottom-line analysis here still comes back not to the issue—I mean, everybody is going to agree. There are instances of rampant, unwarranted, and totally inexcusable violence that sometimes reaches the most heinous form of anything we have ever heard described. And yet the issue is one of what kind of standard of justice, what kind of standard of international behavior, are we going to adhere to within that context?

I think that requires us to make a judgment about our other treaties and about fairness, which will not be decided by either of those issues we are asking for in that report.

Senator TRIBLE. Well, we will look into all these issues thoughtfully, as we have tried to undertake this hearing process, which has now extended to 3 long days, as it should because this is an important matter.

Obviously, the violence is widespread. There is violence on all sides. It seems to me that that presents a compelling argument for crafting a system of justice in the United States where no one, regardless of their side, who commits violent acts can escape justice.

We have a situation today where that can be done.

Moreover, I would point out that that large body of reports indicates once again that there is an alternative to terrorism in Northern Ireland. There is a political system in place.

The point you've made, Mayor Flynn, is that the European Court on Human Rights is open to individuals from Northern Ireland and to others. But our discussion reminds me somewhat of our dilemma on balancing the Federal budget. Everybody wants a balanced Federal budget, but we want to balance it out of someone else's pocket.

We all decry violence, and yet, quite possibly, there may not be a will to take action to respond to violence—again, on all sides, from all quarters. The United States ought not to be a safe harbor for terrorists, for letterbombers. It seems to me that it is responsible for this Nation to draw the line and try to discourage these kinds of acts, on all sides.

Mayor FLYNN. I agree with that, Senator.

Senator TRIBLE. Senator Dodd.

Senator DODD. Thank you very much, Mr. Chairman.

Welcome, Mayor Flynn.

The mayor and I have known each other for 25 years and I consider him one of the best local officials in the country. I am delighted that he is here before us this morning.

He has written rather extensively, I might add, Mr. Chairman, on the subject of the social, economic, and political problems of Northern Ireland, and his testimony in that regard is invaluable to this committee.

At the outset, Mr. Chairman, I would ask unanimous consent that a very good editorial on this issue which appeared in the Boston Globe of September 23, 1985, be included in the record.

Senator TRIBLE. It will be made part of the record at this point, without objection.

[The information referred to may be found in the appendix.]

Senator DODD. Thank you.

Second, there was an excellent piece done by the SDLP, the Social Democratic Labor Party in Northern Ireland, called "Justice in Northern Ireland." I was not here, but I gather at the outset, Mr. Chairman, you quoted John Hume, who I also consider to be a very good personal friend and one of the most courageous political figures that I know of in the world.

Senator EAGLETON. I think we ought to stipulate that for the record, too.

Senator TRIBLE. That will be stipulated.

Senator DODD. This analysis, I think, indicates his deep concern and the SDLP's deep concern for the flaws, if you will, in the judicial system within Northern Ireland. I would ask that this document be made part of the record.

Senator TRIBLE. It is so ordered.

[The information referred to may be found in the appendix.]

Senator DODD. Mayor, I apologize for being late and having missed a good part of your testimony. But as I read your statement, it seems to me that there are two objections you have. One has to do with the judicial system within Northern Ireland and the other has to do with the essence of the treaty before us, regardless of the country that would be involved.

I am concerned about the former, obviously, and what is going on in Northern Ireland and the judicial system there. But my major

objection to what is being offered has less to do with Northern Ireland in this particular case—although I am no less concerned about that problem—than with whether or not this particular language that we are being asked to adopt is flawed in such a way that it could be used in a precedent-setting way in other factual situations around the globe.

Which are your major objections? Is it more the question of what is going on in Northern Ireland or more the objection that you raise in the first part of your testimony on the question of whether or not we ought to be at least watering down, if not exempting, the political offense exception? I don't know if we are exempting it, but we are watering it down, certainly, by anyone's estimation.

Which is the stronger objection you have?

Mayor FLYNN. Those are two good points, Senator.

I think the people of the United States should be concerned about human rights, civil rights here in the United States as they historically have been, and in any part of the world, as they historically have been, whether it be in South Africa or whether it be in the Soviet Union or whether it be in Northern Ireland.

I think that our policy in this Government has not been consistent in dealing with human rights as it deals with the issue of Northern Ireland.

The other point is that the United States Government is being asked by a foreign government to change a law to deny Irish people basic human and civil rights. I don't believe that we should.

So, I guess there are two points. There are other people who can talk about it. Professor Rice from the University of Notre Dame Law School can talk about it from the standpoint of being bad precedent, from the standpoint of changing a treaty in this particular light, more ably than I can. But I can talk about it from the standpoint that there seems to be some sort of arrangement made by our President and by the existing British Government and Mrs. Thatcher to deal with a political problem, and the solution to that political problem is really not the way of meeting the denial of human rights in Northern Ireland. It's a political problem that takes away further rights rather than gives people rights so that Ireland, in fact, can be dealt with from a standpoint of the country having consistent rights across its nation.

Senator DODD. In 1979, the European Human Rights Commission identified a series of examples where the—well, I think it was in addition to that. I think there was a human rights report in 1979 as well, on the conditions of the system of jurisprudence, the condition of the prisons, I think most of the prisons, as I recall. At any rate, it was a condemnation of the system.

Have there been any improvements since 1979? If so, what have they been as a result of that condemnation?

Mayor FLYNN. Senator, you raise an excellent point that in my opinion has not been adequately addressed by world opinion.

Senator DODD. The European Court on Human Rights is what I mean.

Mayor FLYNN. Yes; the European Court on Human Rights.

There is documentation, and that is contained here [indicating] in these two, very long volumes, of denial of basic human rights of the Catholic population for people in Northern Ireland. These are

documented, referred to the court by the Government of Ireland. It makes it very clear for any objective person legitimately concerned about human rights, whether they be there in Northern Ireland or anywhere else—I think it was 121 cases, involving allegations of ill treatment at miscellaneous places, referred to by the commission, which later were documented and proved to be accurate.

So, the point is before you came in, Senator—and I don't criticize this committee, but I basically say that there has been an inconsistent policy on the part of our Government, that they somehow look one way to find an answer to a problem, and they don't look at the situation in Northern Ireland.

I made reference to the United States during the period of the Civil War. It was correctly pointed out by Senator Eagleton that during the Civil War, some people tried to end the Union in our country, which was known, of course, as the United States. But I would point out that in Northern Ireland, to my knowledge, the Irish people have never agreed to any union with Britain nor did they agree to the partition of Ireland.

So, what we are really talking about is a country that is attempting to live with the same type of regulations and civil rights and human rights as any other country that we defend, and I'm saying we ought not to be changing laws in the United States that further deny those rights.

Senator DODD. I thank you very much, Mayor, for being here today.

We appreciate your testimony immensely. It is something I have had a deep interest in for a long, long time. Certainly you are not a "johnny-come lately" to this question at all, and we are grateful to you for coming down here today.

Mayor FLYNN. Thank you, Senator.

Senator TRIBLE. Are there other questions of the mayor?

[No response.]

Senator TRIBLE. Mayor Flynn, we thank you very much for being here today and thank you for your testimony.

Mayor FLYNN. Thank you, Senator.

Senator TRIBLE. Next, we will hear from a panel of witnesses. I would invite Professor Pyle, Professor Rice, Mr. Hannay, and Professor Lubet to step forward.

Professor Pyle, Professor Rice, welcome back. You were here before.

Professor Lubet, welcome.

Mr. Hannay, we thank you for being here.

I would remind my colleagues that Professor Rice and Professor Pyle delivered statements before, but I would invite them to summarize their remarks again, if they wish to do so.

We have their full statements for the record.

I would suggest that we hear from each of these four distinguished witnesses and then ask questions.

Professor Pyle, since you are in the middle, why don't you start?

**STATEMENT OF CHRISTOPHER H. PYLE, MOUNT HOLYOKE
COLLEGE, DEPARTMENT OF POLITICS**

Mr. PYLE. Thank you.

I have a summary that I was prepared to read, but I think, in light of the discussion we have just heard, that I would like to submit it for the record and go directly to some of the questions that Senator Eagleton asked, if that is acceptable.

Senator TRIBLE. Professor Pyle, your summary will be made a part of the record at this point.

Mr. PYLE. Thank you.

[The information referred to follows:]

EXTRADITION, POLITICAL CRIMES, AND WAYS TO DEAL WITH TERRORISM

THE POLITICAL CRIMES DEFENSE TO EXTRADITION, PROPERLY UNDERSTOOD, IS:

1. A rule of *law*, not politics;
2. that keeps courts (not the executive) *neutral* towards both sides in *foreign uprisings*, and
3. *protects both rebels and former government officials* (and their American supporters) from delivery to the regime they have opposed by force of arms in a struggle for power.
4. A *humanitarian rule* to avoid complicity by our courts in *victors' justice*;
5. *that admits exceptions* for humanitarian reasons (e.g. not shielding terrorists).

CRITERIA FOR A WELL-DRAFTED EXCEPTION TO THE DEFENSE:

1. must be both principled and neutral.
2. It must be capable of equal application by our courts to former rebels, deposed officials, and their American collaborators.
3. It must also be capable of equal application to requests from all foreign regimes, so that our courts cannot be accused of favoring some regimes but not others, or of helping to suppress all rebellions against some regimes.
4. The exception must judge every accused person by his alleged conduct, and not by what his group (or former regime) is said to have done.
5. It must distinguish between rebels and terrorists, and between legitimate law enforcement and state terrorism.
6. It must not risk collaboration by our courts (marshals, prosecutors, and jailors) with victors' justice in foreign lands.

SEVEN WAYS TO DEAL WITH THE PROBLEM OF TERRORISM:

A. CATEGORICAL EXCEPTIONS FOR VIOLENT CRIMES OR WEAPONS OFFENSES

ADVANTAGES

1. Symbolic blow against "terrorism."
2. Can be used, as in U.K. treaty, to help allies suppress revolts.

DISADVANTAGES

1. Overbroad: does not distinguish between rebels and terrorists.
2. Essentially a court-stripping measure that would transfer decision of who should be surrendered from neutral courts to partisan administrations subject to diplomatic and military pressures.
3. Would commit our courts to assisting some foreign regimes to suppressing all rebellions against their authority, any where in the world, now and forever, unless future politicians decided it is in their interest (and perhaps the nation's) to abrogate the treaty.
4. Would create two systems of extradition: one for favored nations and one for unfavored nations. Unfavored nations would successfully exert pressure to obtained favored nation status, thus corrupting original intent, which was to favor democratic and fair nations only.
5. Not neutral. Biased against revolutionaries and in favor of established regimes. Thus denies respect for the moral right to revolution.

B. EXCEPTION FOR PERSONS CHARGED WITH TERRORISM

ADVANTAGES

Symbolic blow against "terrorism" as politically defined by regimes in power here and abroad.

DISADVANTAGES

1. "Terrorism" is a vague and imprecise term loaded with emotional and partisan connotations. Not suitable for use in a rule of law that must be both principled and neutral.
2. Biased against revolutionaries, since "terrorism" more often connotes excesses committed by rebels than by the police and military. Excesses of former soldiers, police, or politicians would enjoy a presumption of legitimacy as reasonable law enforcement measures.
3. Exception for "terrorism" would thus express disrespect for moral right of revolution.

C. EXCEPTION FOR ALLEGED ACTS OF GENOCIDE

ADVANTAGES

1. Focuses on the morality of the means used, rather than the political ends sought, and is thus capable of more impartial administration by courts
2. Symbolic blow against one form of terrorism.

DISADVANTAGES

1. Term "genocide" is vague, imprecise, and loaded with emotional and partisan connotations that make it a poor instrument of legal expression.
2. Concept too narrow to cover much of the indiscriminate killing generally viewed as terrorism.
3. Application would not reach many forms of terrorism, especially by rebels, but
4. would encourage allegations of collaboration with "victors' justice."

D. EXCEPTIONS FOR VIOLATIONS OF LAWS OF WAR

ADVANTAGES

1. Would apply humanitarian principles well developed (if rarely enforced) for international wars to civil wars and other uprisings.
2. Focuses on the morality of the means used, rather than on the political merits of the ends sought. Would allow courts to distinguish between rebels and terrorists and between legitimate law enforcement and state terrorism.

DISADVANTAGES

1. Politically embarrassing, since our military does not wish to be bound any extension of the Geneva Conventions (1949) to counter-insurgency situations.
2. Might deny protection of the political crimes defense to legitimate rebels (like our "Minutemen") too early in the evolution of a rebellion.
3. Might unreasonably demand that rebels against a brutal, but militarily powerful regime limit themselves to conventional tactics that, under those circumstances, offer no chance of success.
4. Laws of war approach requires a para-military uprising, whereas the current political crimes defense can be read to protect persons who, while not part of an uprising, use focused violence to flee a police state.

E. EXCEPTION FOR WANTON CRIMES

ADVANTAGES

1. Would focus on the morality of the conduct alleged, rather than the political merits of the cause that the accused is alleged to have fought for. Thus would distinguish between rebels and terrorists and between legitimate law enforcement and state terrorism.
2. Capable of equal application to both sides of a foreign uprising. Would preserve the neutrality of U.S. courts towards the political merits of a foreign contest for power.

3. Would allow courts to extradite for all forms of intentional indiscriminate killing generally considered to constitute terrorism, genocide, or violations of the laws of war.

4. Would build on an established body of law. Wanton crimes exception has already been adopted by U.S. courts and by the European Convention on the Suppression of Terrorism.

5. Is a standard courts can administer on analogy to laws of negligence, self-defense, excessive force, etc., but tailor to the realities of foreign uprisings.

6. Would thus allow the humanitarian exceptions to grow case-by-case, in the tradition of the common law, just as the political crimes defense has grown, case-by-case.

DISADVANTAGES

1. May be seen as granting courts too much discretion.

2. Could be read so broadly as to destroy the political crimes defense.

3. Could be read narrowly, so as to permit much indiscriminately killing, so long as that killing is authorized. (Which may be an advantage, in that it forces rebels and regimes to take political responsibility for, violence that, in the eyes of outsiders, appears indiscriminate, wanton, or heinous.)

F. AN AFFIRMATIVE RULE OF INQUIRY

ADVANTAGES

1. Would remind courts of their constitutional authority to inquire into the capacity of the requesting regimes to do justice.

2. Would protect most rebels and most former officials from victors' justice, because the risk of victors' justice could be assessed.

3. Would acknowledge that the right to revolution may legitimately be asserted against regimes that are not capable of doing justice to rebels or to deposed officials.

DISADVANTAGES

1. Could, if applied too broadly, prevent all extradition by demanding perfect justice in a world where perfection is not possible. (This risk could be averted by wise application of the power to condition extradition on the promise to comply with generally accepted standards of justice.)

2. Could, if not supplemented by the political crimes defense and a wanton crimes exception to that defense, permit judicial blindness to the partisan dimension of some extradition cases and open U.S. courts to charges of favoring some regimes (or rebels) over others.

G. COMBINATION OF THE POLITICAL CRIMES DEFENSE, THE WANTON CRIMES EXCEPTION, AND THE AFFIRMATIVE RULE OF INQUIRY

ADVANTAGES

1. All of the advantages of the three rules.

2. Would protect president and diplomats from pressures to surrender people for reasons of state. Authority to avoid potential injustice would be squarely in hands of an independent, impartial judiciary applying neutral legal standards.

DISADVANTAGES

1. Would deny president the discretion to recover hostages by surrendering former officials (as in case of Shah of Iran). (But would protect presidents from having to make such choices.)

2. Might, in short term, make it more difficult to get foreign cooperation in the recovery of ordinary U.S. criminals who flee abroad, since it would deny our prosecutors persons to trade in return. (In long run, however, it would confine international negotiations for the return of fugitives to demands for ordinary criminals only.)

Senator EAGLETON. I would ask that they pull in their microphones, please, so that we can hear them better.

Senator TRIBLE. Gentlemen, you are invited to proceed as you see fit, and please pull your microphones closer. Speak with authority.

Mr. PYLE. Senator Eagleton, you spoke in favor of the categorical exceptions for violent crimes contained in article I of the European Convention on the Suppression of Terrorism. These are supposed to be the model for the treaty you have before you.

I think it might be helpful to this committee if you knew that 13 European countries have refused to accept that list of categorical exceptions.

Senator EAGLETON. Yes. Which ones have, first. Start with the haves and then go to the have-nots.

Mr. PYLE. Eight countries have accepted the categorical exceptions: Austria, West Germany, Liechtenstein, Luxembourg, Portugal, Spain, Turkey, and the United Kingdom.

Seven countries have chosen not to accept that approach, and have expressly reserved for themselves the right to decide what constitutes a nonextraditable political offense. They are: Cyprus, Denmark, Iceland, the Netherlands, Norway, Sweden, and Switzerland.

Four countries signed the treaty but later refused to ratify it. They are Belgium, France, Greece, and Italy.

Two countries refused even to sign the treaty. They are Ireland and Malta.

Senator EAGLETON. Well, why didn't you make a list of the haves if you have made a list of the have-nots?

Mr. PYLE. Because the reservations that were entered were reservations by the countries that made exceptions.

Senator EAGLETON. Well, if you just wanted to tell the committee about the ones that didn't sign up, so you didn't have time to find out which ones have signed up.

Mr. PYLE. I'm sorry. I received this yesterday afternoon at 4 o'clock and I wasn't able to do that. I apologize.

Senator EAGLETON. The convention was adopted in 1978.

Mr. PYLE. Yes. But the library I am working from didn't have these, and we had to get these from another source.

I can tell you the countries, if you would like. If not, I would just simply say that nine countries have chosen to reserve for themselves the task of defining what a political offense is.

In addition, three countries have accepted an option which that treaty offers, which is very similar to the wanton crimes exception—Norway, Switzerland, and Italy.

Senator EAGLETON. You're not citing Italy as a classic example of how to handle extradition, are you?

Mr. PYLE. Not politically. Maybe judicially, but not politically. No.

Senator EAGLETON. Well, it was handled judicially. The magistrate turned down our complaint warrant for Mr. Abbas. It was judicial.

Mr. PYLE. Was that a judicial magistrate or one of their investigating magistrates?

Senator EAGLETON. Yes; with an arrest warrant, with a complaint that went to a magistrate.

Mr. PYLE. Fine. I am not a fan of that procedure.

I think it might also help the committee to understand that the European Convention also contains the rule of affirmative inquiry that you have difficulty with. As I read the convention, all of the

countries that ratified, including the British, have accepted the rule of inquiry, and that suggests another trend that is going on in the development of extradition law.

Now, you also spoke of the Diplock courts. I would like to suggest to the committee that, as you analyze the capacity of any country to do justice, you don't look simply at its court system. I think you have to look at the entire legal system of interrogations, incarcerations, investigations, trials, and appeals.

I agree with Senator Eagleton that the record in Northern Ireland is not wholly bad; it is a mixed record. I concluded in my statement that the record was not sufficiently admirable to justify extradition at this time. But the record is not wholly bad.

The Diplock courts have shown skepticism about the testimony of supergrasses—these are paid informants—and have acquitted some people on the basis of those doubts. Recently, in the *McGlinchey* case, of "Mad Dog" McGlinchey, the court of appeals in Northern Ireland reversed a Diplock court's conviction, and then McGlinchey was extradited back to the Republic of Ireland, where he is also charged with serious crimes. So it is a mixed record.

When you have a mixed record situation, instead of simply barring extradition, you might want to consider conditional extradition, which is something our Government used in the *Abu Eain* case, when Israel sought a Palestinian, but sought to prosecute him in a special court. Our State Department said you may have him back, but only if you prosecute him in a regular court, under regular procedure.

Now I think a judge could also apply that conditional requirement. So, when I say that I want to inquire into the capacity of the requesting regime to do justice, I'm not asking that that country do justice in the same way that we do justice. I'm looking for indicia of systematic unfairness or evidence of redeeming fairness in recent years.

I think that that judgment should be made on the totality of the circumstances, and I believe that judges in American courts are capable of that kind of assessment.

I think that the provisions of the European Convention that are moving the law in this direction are interesting, and ought to be given serious consideration—but only if you understand that the inquiry could be used in conjunction with conditional extradition. The two approaches must be used together, because no system is perfect, and if we ask for a perfect system in every respect, there will be no extradition.

Those are my main points.

There was one other thing.

Senator, when you spoke of one witness talking of commandeering aircraft, was that—

Senator EAGLETON. That was Professor Bassiouni. He is not here today.

Mr. PYLE. Oh. I thought it might have been a reference to my testimony.

Senator EAGLETON. I think the testimony, Mr. Chairman, of Professor Bassiouni, who was unable to return, is seriously flawed.

Senator TRIBLE. Professor Rice.

STATEMENT OF CHARLES E. RICE, PROFESSOR OF LAW, NOTRE
DAME LAW SCHOOL

Mr. RICE. Thank you. I can be rather brief because I have submitted the detailed statement.

Basically, my points are three.

First of all, the proposed treaty is overly broad. It would limit the political offense exception to purely political offenses and to those which are nonviolent. But I don't think it can be seriously contended that everything that does not fit into those categories is an international terrorist offense.

The political safeguard, as the British statement on the treaty calls it, is an important aspect of our law.

The second reason why I would oppose this treaty strenuously is because it interferes with a judicial function which the courts are performing well. The key to this, in my view, is the wanton crimes exception, which I believe would take care of the problems raised by Senator Eagleton. This is a short-circuiting of that process; an attempt to do, by an a priori mechanism, defining in a treaty, something which requires a case-by-case application by the courts and which the courts are doing.

The third reason for my opposition to the treaty is that the basis on which the treaty has been proposed is, as Judge Sofaer testified in his statement, that the political and legal systems in Northern Ireland are fair.

Now that is the rationale for the treaty. It would seem to me quite clear that the proponents of the treaty have the burden of proof on that issue, and I am concerned at the fact that we are getting this issue decided perhaps on the basis of secondary evidence.

I would strongly urge this committee, or some other committee if this committee is unable to hear noncitizen witnesses, to inquire into the legal system in Northern Ireland by firsthand evidence, subject to cross examination, evidence from attorneys who practice in those courts, solicitors and barristers who know something about it.

I cannot pose as an expert on the law of Northern Ireland. I have not practiced in the courts there. I have studied it. But I think what is necessary is a detailed examination from those who can provide firsthand, expert information.

It seems to me that the administration has not met its burden of proof on this and that there is plentiful indication that there is such evidence available.

When I was there, Father Desmond Wilson, who works among the poor in Ballymurphy, which resembles nothing so much as it resembles an occupied country recently conquered, said to me, and I quote:

We are now in the same position as many totalitarian governments where the police can arrest anyone they want. They can bribe and threaten in efforts to put away their political opponents.

This is the classic tactic of totalitarian governments.

People make the mistake of believing the British Government is a very well developed democracy. But, in fact, it is acting in Ireland as a dictatorship and a dictatorship of the worst kind.

This sort of on-the-scene impression is not something that comes merely from those who support paramilitary activity. Sean Mac-

Bride, whose letter I have attached to my statement, is a good example, and I thoroughly support his position.

Father Dennis Faul has said, and I quote:

It is imperative that Britain be treated internationally as a pariah as long as it pursues its present militaristic policies and the denial of fundamental freedoms and human rights.

Money is not what Northern Ireland needs. It needs to be made an issue in the United States human rights crusade, until these rights are guaranteed and protected by acceptable political structures in Northern Ireland.

So we have those three problems. First, the treaty itself is overly broad. Second, it would improperly, in my view, interfere with a judicial function, which is being well performed. Third, it lacks the necessary evidentiary foundation which should be provided by those who would advance it on the theory that the political and legal process of Northern Ireland is fair. It lacks the foundation from firsthand, expert evidence which they are obliged to produce.

Thank you, Mr. Chairman.

Senator TRIBLE. Thank you, Professor Rice.

Mr. Hannay.

STATEMENT OF WILLIAM HANNAY, ESQ., SCHIFF, HARDIN & WAITE

Mr. HANNAY. Thank you.

Mr. Chairman and members of the committee, I am appearing before you today to testify in support of the Supplementary Extradition Treaty between the United States and the United Kingdom.

I am an attorney at law and I am also an adjunct professor at Chicago Kent Law School in Chicago.

I have written on the subject of the political offense exception on several occasions and testified 2 years ago with respect to the extradition legislation proposed at that time.

A written statement will be submitted if the committee pleases, but I will summarize two points that I would like to make.

First is that the principal focus of this debate should be on the subject of the political offense and not on the political and court system in Northern Ireland. That is a separate issue, and I believe it should be dealt with separately.

Second, I would like to address article I of the treaty.

I believe that the issue is a simple one. If you vote against this treaty, you are saying that, as a matter of American national policy, it is perfectly all right for someone to pick up a gun and kill any policeman or soldier that he sees just because the legislature is not moving as quickly as he likes in the direction that he likes. This should not and must not be the policy of any democratic nation and certainly not the policy of the United States.

The principal opposition to the provision in article I excluding murder from the political offense exception is that there is a right to rebel and that, once you recognize that right to rebel, you cannot interfere to prevent revolutionaries or rebels in some other country from exercising that right. That logic, of course, would include the bombing that Senator Eagleton talked about. Mayor Flynn was put in a difficult position in answering the Senator's question because, if you accept the logic of that position, you

cannot interfere with the tactics and strategy of those who would pursue it.

I say that there is no such right to rebel in a democratic country where the institutions of democratic government are in existence.

Senator EAGLETON. Don't some rebels use terrorism as a function of their rebellion?

Mr. HANNAY. Absolutely, Senator.

Senator EAGLETON. The PIRA?

Mr. HANNAY. Absolutely.

Senator EAGLETON. The PLO?

Mr. HANNAY. Professor Pyle has addressed that in an appendix to his piece, and he is quite correct. They use terrorism.

Senator EAGLETON. As a function of their rebellion.

Mr. HANNAY. Absolutely.

If you look at the *Abu Eain* case, which was decided by the seventh circuit a couple of years ago—correctly, I believe, in terms of sending the accused back for trial—the defense was that Abu Eain, who was accused of intentionally setting off a bomb on a street corner where a children's parade was going through, was protected under the political offense exception because you cannot challenge the tactics of those who would rebel against their alleged oppressors.

The seventh circuit held that his crime was not within the political offense exception, and that is the basis of the wanton crimes exception to the exclusion, which has been referred to.

Senator DODD. But haven't they done that without this treaty?

Mr. HANNAY. They have. But—

Senator DODD. Well, why do you need the treaty if we all agree on that one. Why do we raise that example when the courts clearly don't need it?

Mr. HANNAY. Actually, there are a lot of problems with that case. The rationale of the seventh circuit's holding that his conduct fell outside the exception was that Abu Eain had not received authorization from the PLO for this particular attack. Had he done so, the court said, it would have been covered by the political offense exception. That, to me, is shocking logic. The possibility of such a loophole is the reason why even a wanton crime must be expressly excluded by treaty.

But I go further than that. I say that all murder committed for a political motivation must be excluded, and that that is the central focus of the debate today.

Senator KERRY. Under that doctrine, I guess the Contras could be extradited to Nicaragua from Honduras.

Mr. HANNAY. That would be correct if I were urging upon you a statute or convention applicable to all nations.

I am not, however. What is before you is not a general statute applicable to all nations. Rather it is a treaty specifically targeted for a specific country with specific democratic institutions.

We are not dealing with the Contras in Nicaragua or Honduras. We are dealing with the United Kingdom.

You can, if you choose—and you have this prerogative, as the Senate of the United States—examine the nature of the United Kingdom's political and judicial system, and your ultimate decision on the treaty could be influenced by that.

But the point is—and it seems to me that this is what the speakers today were saying—that, if it is concluded that the United Kingdom's system is fair, then there is no reason not to extradite murderers there.

Senator KERRY. I'm sorry to interrupt, but do you suggest that we should be approaching this on an ad hoc basis like that, that the standards should be individualized?

Mr. HANNAY. The term "ad hoc" suggests a certain pejorative nature. I think it should be done on a treaty-by-treaty basis with respect to the political offense issue.

There was an effort to enact, if you will, worldwide legislation a few years ago. The approach that had to be taken there is substantially different than the approach that can be taken when you deal with a particular country.

I believe that we should be standing together with the democracies of the world, rather than standing apart on the issue of political terrorism.

We have talked about precedents in this area. Senator Dodd asked whether we would be setting a bad precedent. There is good precedent for this treaty.

Those who support the treaty can point to the Council of Europe's Convention on the Suppression of Terrorism as an example in which there has been a blanket prohibition on certain types of violence even if undertaken with a political motivation.

I would add that not only is there a ban contained in that convention on bombs, grenades, automatic firearms, and letter- or parcelbombs, but there is also a second article which specifies that "a contracting state may decide not to regard as a political offense a serious offense involving an act of violence against the life, physical integrity, or liberty of a person"—a provision that is even broader than the bomb provision that was discussed.

I would also draw attention to the precedent of the French *Chambre d'Accusation* of the French Court of Appeals which upheld the extradition of a Basque terrorist for the murders of an alderman and six members of the civil guard in Spain. The fugitive claimed that he was charged with crimes that were perpetrated as part of the struggle for political autonomy waged by a segment of the population in the Basque provinces of Spain and therefore could not be extradited.

The court rejected his argument and refused to apply the political offense exception, stating that "irrespective of the object sought or possible context—murders—are too serious to be regarded as having a political character or as being related to a political offense."

These authorities are solid precedent for article I of the supplementary treaty.

Finally, let me just mention my hometown newspaper, the Chicago Tribune which, in a recent editorial, said that:

American civil libertarians and some judges have strained to draw a fine line between IRA murders of women and children and those of British soldiers or Ulster policemen, claiming the latter were politically motivated. In Ireland, as in Ulster and Great Britain, no such distinction is made or tolerated. The Irish are tired of having their own policemen killed or wounded by IRA street criminals.

Obviously, the issue of Northern Ireland generates substantial emotion. That emotion can be felt in the pressure brought to bear on U.S. Senators by Irish-American groups that oppose the treaty. But emotion is no substitute for reason.

The question of whether Ireland and Northern Ireland should be one country—or whether Great Britain and Northern Ireland should continue to be one country—may be complicated. But it does not stand to reason that this treaty presents a complicated issue.

The issue before you is as simple as I stated it at the beginning of my statement: The United States does not serve the interest of citizens of Northern Ireland, be they Catholic or Protestant, by contributing to the destabilization of the political process in that country; nor does the United States serve its own interest in protecting American citizens around the globe by refusing to take a strong stand against political violence.

This treaty would take such a stand, and I urge it upon you.

Thank you very much.

Senator TRIBLE. Thank you very much.

Professor Lubet.

STATEMENT OF STEVEN LUBET, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. LUBET. Thank you, Mr. Chairman, very much.

I also have submitted a written statement and I will not rehearse the points that I made in it in the hope that you gentlemen will have some time to give it some attention.

Senator BIDEN. Well, go ahead and make some statement. I, for one, would like to hear it.

Mr. LUBET. Oh, I will make a statement.

I am just not going to read the entire 15 pages that I have prepared.

Senator TRIBLE. Your statement will be made a part of the record. Senator Biden will have an opportunity to read it.

Senator EAGLETON. It's very good reading.

Mr. LUBET. Thank you very much.

Let me address first the question of the fairness of the Diplock courts, which has been one of the principal objections raised to the ratification of this treaty.

The fact is, gentlemen, that under our current extradition treaty with the United Kingdom, we provide for the extradition of individuals who will be tried in the Diplock courts. Not only does the United States do this, but the Republic of Ireland does it as well.

There has been no proven example arising from extradition from Ireland of individuals who have been railroaded through the Diplock courts, and the argument that suggests that that court system means we should not ratify this treaty, extended to its obvious and logical conclusion, would be that we should abrogate entirely our current treaty with the United Kingdom. I hear no one arguing that we should do that, and in the absence of that argument, the objection to the Diplock courts simply fails.

Look at Senator Eagleton's example of Mr. Quinn, whom, I believe, most people agree should be brought to justice; that is, we

should be extradited for sending letterbombs to clergymen. Under our current treaty, were he extradited, he would be tried in the Diplock courts.

That is the method in which he can be, and should be, brought to justice. Any other conclusion would mean that we should not have any extradition relationship with the United Kingdom, at least as it applies to Northern Ireland.

The example, of course, of Mr. McGlinchey puts I think as fine a point on it as can be made.

Dominic McGlinchey was the most wanted terrorist in the British Isles. He was extradited from the Republic of Ireland to Northern Ireland to stand trial in a Diplock court. He was tried and convicted, and the conviction was reversed by a court of appeals.

That proves every point. The trial must have been fair, and the Republic of Ireland was willing to be satisfied with the level of justice.

Finally, let me say that I am not an advocate of the Diplock system nor am I an advocate of the partition of Ireland. But those things about the Diplock system that are the most objectionable would not obtain in cases of extradition from the United States.

I am talking here about the, shall we say, relaxed approach to search and seizure, and I am talking about the widespread use of administrative detention—two things that we would never countenance in the United States. But they cannot obtain in the case of international extradition: First, the apprehension will occur here, not in Northern Ireland, if the individual is to be extradited; and, in the second place, there can be no extradition for administrative detention because extradition can only take place once a formal charge has been filed.

So, the two most noxious aspects of that legal regime simply would not pertain in the case of an individual who is being extradited.

Let me now address very briefly two issues—really, I should call them nonissues—that have been raised regarding this treaty, the question of retroactivity and the question of the statute of limitations.

It has been the law in the United States, at least since 1874, that extradition treaties are not in the nature of *ex post facto* laws. They are always retroactive as to crimes that were committed before the existence of the treaty so long as the act was criminal at the time it was committed. That has been the law for 100 years. This treaty does not change it. And it is a good law. It is that law, for example, that allows the extradition of Nazis from the United States to Israel, something that the United States has just embarked upon. I would hope that everyone would agree that that is a laudatory goal for us to seek.

On the question of the statute of limitations, what this treaty does is to change the term from applying the statute of either the United Kingdom or the United States—whichever is shorter—to applying the statute of limitations of the country in which the crime was committed.

That provision already exists, as I count, in about 20 extradition treaties to which the United States is a party—that is, we'll apply the statute of limitations of the law of the requesting country.

This makes perfect sense.

Let me just give you a quick example.

The statute of limitations in the Federal Republic of Germany for murder—murder—is 20 years. In the United States we have no statute of limitations with regard to the offense of murder.

If we were to apply the provision before the amendment of the United Kingdom treaty, an individual could commit a murder in the United States, flee to the Federal Republic of Germany and, after 20 years, would be free from prosecution, because of the application of the asylum state's statute.

It makes no sense for us to put ourselves in that position and, indeed, our current treaty with the Federal Republic of Germany provides for just the opposite. The statute of limitations of the requesting state, the area where the crime was committed, would be the one that applies.

Surely, in the case of the hijackers of the Italian cruise ship, we would want our statute of limitations to apply to our extradition request and not that of Italy. Indeed, Italy again is another country with whom we have such an extradition arrangement.

Since I promised to be brief, I will not cover my final point, which would be the longest, and that deals with the definition of the political offense exception. I am certain that that will be covered in questions.

Let me only say that taking a treaty-by-treaty approach with certain selected countries does not foreclose the possibility of also enacting, shall we call it, baseline legislation that would apply in all other cases.

There is no reason not to define the political offense exception differently for some countries than for others, as we never take a universal approach to questions of bilateral relations with other countries. We should not treat England in the same way that we treat South Africa or Poland, two other countries with which we do have extradition treaties.

Thank you very much, Mr. Chairman.

Senator TRIBLE. Gentlemen, we thank you for your testimony today.

Mr. LUBET. I hope that was authoritative enough, Mr. Chairman.

Senator TRIBLE. I'm sorry.

Mr. LUBET. I hope that was authoritative enough, as was your request for us to speak.

Senator TRIBLE. You met the standard imposed by the committee.

Let me ask each of you whether, in your judgment, those who killed Lord Mountbatten would be extraditable under U.S. law today?

Professor Rice.

Mr. RICE. I think that would come under the wanton crimes exception as far as the political offense exception is concerned.

Now, whether in any case the accused is extraditable depends, of course, on other questions. You have to establish probable cause. And, in my view, the court should adopt a limited rule of inquiry. But the question which I think you have in mind is would that be covered by the political offense exception, and I think it is clearly not covered by it, and I think the courts would so agree.

Senator TRIBLE. So your answer is yes, they would be subject to extradition?

Mr. RICE. Provided they met all the other requirements for extradition, probable cause, and, in my view, inquiry into the justice—

Senator EAGLETON. Well, now, there is a hooker on that one, Mr. Chairman. He is adopting the rule of inquiry—

Mr. RICE. Yes, sir.

Senator EAGLETON [continuing]. Which is not a standard law of the world. So he is putting a footnote on his answer, saying he wants to adopt a rule of affirmative inquiry—

Mr. RICE. Senator—

Senator EAGLETON [continuing]. Where the law is noninquiry.

Mr. RICE. Senator, the European Convention on the Suppression of Terrorism adopts a rule of inquiry.

Senator EAGLETON. We're talking about our treaty relationships, our extradition laws—

Mr. RICE. I understand.

Senator EAGLETON [continuing]. Vis-a-vis the rest of the world. It's a doctrine of noninquiry.

Mr. RICE. Right. More recently, in the *Doherty* case, Judge Sprizzo in dictum—

Senator EAGLETON. Dictum?

Mr. RICE [continuing]. Yes, sir. It was not necessary to a decision in the case. He did inquire into the justice of the system there, and he found that—

Senator EAGLETON. It was a gratuitous adventure on his part.

Mr. RICE. Yes, sir. And I believe that the court should do that, if you want to so characterize it. But I believe the court should do that because extradition is a situation where the person who is accused is at a significant disadvantage. He cannot cross-examine witnesses. The requesting state does not even have to produce witnesses. It is really to our advantage to make sure that the scales are weighted, in a sense, in his favor.

I believe the rule of inquiry is very proper—

Senator EAGLETON. What you're telling this committee, in all candor, Professor Rice, if you want to be completely candid with the committee, since you would adopt a rule of inquiry, of affirmative inquiry, since in your prepared testimony you said that the Diplock procedures are inherently heinous, you would not, as a magistrate or district judge, extradite the murderer of Lord Mountbatten or the fellows that blew up this restaurant and killed 12 people and maimed 30 people.

Mr. RICE. In my view that is, first of all, clearly not a political offense, because it would come under a wanton crime.

Senator EAGLETON. OK. But you would not extradite because of Diplock.

Mr. RICE. In my view that is correct. However—

Senator EAGLETON. It is correct that you would not extradite.

Mr. RICE. However, I would recognize that that is a decision for the court, and I would be satisfied with whatever decision the courts make.

All we can ask is that the decision be made by the proper forum, and Judge Sprizzo reached—

Senator EAGLETON. If you were the magistrate, if you were the district judge, would you extradite in the *Mountbatten* case?

Mr. RICE. If I were a magistrate or a district judge, I would not extradite any Irish Republican to Northern Ireland, period, paragraph.

Senator EAGLETON. That's what we've been trying to get at for 5 or 10 minutes.

Mr. RICE. Yes, sir. Well, I gave it to you in 30 seconds.

Senator EAGLETON. I want it on the record: You would not extradite under any circumstances to Northern Ireland.

Mr. RICE. I would not extradite any Irish Republican to Northern Ireland.

Senator EAGLETON. Mr. Pyle would not extradite in any case except the other day he would extradite in the *Quinn* case, so he is ambivalent.

Mr. PYLE. I'm not ambivalent. I make a distinction there, sir.

Senator EAGLETON. You believe in a doctrine of affirmative inquiry, Professor Pyle?

Mr. PYLE. Yes; I do.

Senator EAGLETON. So you would not extradite any PIRA person, regardless of the heinousness of the crime—

Mr. PYLE. No; that's incorrect.

Senator EAGLETON [continuing]. To Northern Ireland.

Mr. PYLE. Mr. Quinn is wanted by the criminal courts of London, not by the courts of—

Senator EAGLETON. So you'd extradite him to London?

Mr. PYLE. Yes; I would. To the ordinary criminal courts of London.

Senator EAGLETON. But in the *Mountbatten* case, you would not extradite to Northern Ireland?

Mr. PYLE. In the *Mountbatten* case, I could not extradite to a Diplock court in Northern Ireland. And I would think it appropriate for this committee, as you consider a treaty, to look at the system as a whole.

I think Judge Sprizzo was correct to look at the quality of justice in Northern Ireland.

Now, in his case, he looked at it, and he was confident that, on balance, the system was sufficiently fair to authorize extradition, had not the political crimes defense pertained.

I accept that analysis. I don't agree with his conclusion, but I accept his inquiry as the proper procedure that this committee should adopt in a treaty.

Mr. RICE. Senator, could I add one thing which may clarify this? Let me give you an example of why I take that position.

I had the opportunity in Northern Ireland to talk at considerable length with Patrick Finucane, who was an attorney who represented defendants in the *McGrady* case, a supergrass case.

In that case, Lord Lowry said this. He talked about the sole witness, the sole witness McGrady. He said that to have convicted people on some of the charges, "would have been a perversion of justice according to law, so contradictory, bizarre, and in some respects incredible was McGrady's evidence and so devious and deliberately evasive was his manner of giving it. Even in relation to other incidents, he repeatedly showed himself up-intelligent, seeing

a difficulty before it broke upon him, and then prevaricating to shore up a crumbling position."

Then what the judge did with respect to other charges, again, solely on the evidence of this witness, was that he convicted seven people. He sent one of them away to jail for life, another one for 12 years, and five for lesser terms. And we have to remember that in those courts, it's not simply the lack of a jury. For example, involuntary confessions are admissible, provided they are not produced as a result of torture, inhumane, or degrading treatment which was worked in order to induce the person to confess.

I think what we have to do, in order to make a serious judgment on this, is to get that first-hand evidence from people like Patrick Finucane and people like Desmond Boal and other people who have practiced in those courts. Don't take my word for it. I am a secondary authority on it, not an authority at all.

I'm asking the committee or some other committee of this Congress to go and get that evidence. I am as convinced as you are that the direct attack, the intentional attack on noncombattants is a wanton crime and is not a political offense. But I am also convinced that we ought not to go overboard on this thing and to take away from the courts this function which they are performing properly.

Senator TRIBLE. I would ask the remaining members of the panel this question: Would those who killed Lord Mountbatten be extraditable under current law? Should they be?

Senator PELL. Could I ask one question, Mr. Chairman?

Does that mean extraditable to Northern Ireland or extraditable to the Republic of Ireland?

Senator TRIBLE. Extraditable, period.

Mr. LUBET. Well, extraditable, period, is the simplest question, and the answer is absolutely yes. They should be. Extraditable to Northern Ireland is more complicated, but my answer is still yes, they should be. But I express grave concern and doubt about whether they would be under the current situation in American law.

The better view of the law, the view that I have promoted, is that such a crime would not fall within the political offense exception.

But we have the situation now where U.S. magistrates apply that law, exercising unreviewable discretion, and they apply it in the most nonunderstandable manner, in the absence of legislation or treaties to give them greater guidance.

For example, the judge in the *McMullen* case, stated that "no matter how heinous the crime may be, it is free from extradition if it is committed under political circumstances." I would expect that that judge would not extradite the killers of Lord Mountbatten. Similarly, the judge in the *Quinn* case, who found that sending letterbombs to civilians could be a political offense would, I assume, apply that same—I hesitate to call it logic—but would apply that same reasoning to the Mountbatten situation, and I have to imagine that that judge would not order extradition under the current state of American law.

I have to say that I think both of them would be wrong. But there is no appellate review of those decisions against extradition,

and, therefore, one can have no confidence that the current state of the law would bring about the correct and just result.

Senator TRIBLE. Thank you.

Mr. HANNAY. I agree with Professor Lubet. The correct view of the law is that they should be extradited because of the wanton crimes concept that Senator Dodd mentioned.

The problem is with the definitions by the seventh circuit in *Abu Eain* and by the Federal district judge who denied extradition in the *Quinn* case. Once you have an uprising, then any crime that is incidental to that and authorized and undertaken by the organized revolutionary force, is included within the political offense exception. It doesn't matter what they do. Anything they do is covered. That's why *Quinn* is not being extradited.

As you may recall from the previous legislative effort to revise the U.S. extradition laws, there are a lot of quirks in our procedures. If a magistrate denies extradition, it is unreviewable. If a magistrate orders extradition, it can be reviewed in a habeas corpus proceeding. That is how the *Quinn* case got to the Federal district court and why it is now before the ninth circuit.

Hopefully, reason will prevail, extradition will be granted, and we won't have to worry so much about that case. But right now, under prevailing law, the Mountbatten killers would not be extradited, I fear.

Senator TRIBLE. Professor Rice, you seem to hang your hat on the contention that true terrorist activities are extraditable under the wanton crime exception announced in the *Abu Eain* case.

Professor Pyle has written, and I quote, that "this case represents a strained interpretation of political offense." And in the opinion of that case, the judge called it "a unique case in United States law of extradition."

What precisely is the definition for the wanton crimes exception? What makes you so sure that future courts will apply that doctrine?

Mr. RICE. Good. I am glad you asked that.

It is covered in my prepared statement.

Senator TRIBLE. Well, this is your opportunity to talk about it.

Mr. RICE. Yes.

The point in the *Eain* case is this. The court held that the petitioner had not carried his burden of proving, "that the bombing was incidental to the PLO's objectives," and, therefore, they held he was not extraditable.

Now this was the holding of the court.

The court then went on to discuss, in dicta, the question of the character of the petitioner's activity. They did not reach the wanton crimes issue because they would not have reached that issue unless he had shown that his action had been performed in connection with the PLO.

But listen to what the court said. The court in those dicta quoted approvingly statements by commentators that "an offense having its impact upon the citizenry but not directly upon the government does not fall within the political offense exception;" and, "the legitimacy of a cause does not, in itself, legitimize the use of certain forms of violence, especially against the innocent." Then the court concluded—and I read these couple of sentences to illustrate that

this court in my view was ready to hold that this was a wanton crime and therefore not a political offense had the issue been presented to it—the court said, “But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates anarchist-like activity.” Then it continues, “Yet the bombing, standing detached, as it was, from any substantial tie to political activity—and even if tied, as petitioner insists, to certain aspects of the PLO’s strategy to achieve its goals—is so closely analogous to anarchist doctrine considered in cases like *In re Meunier*, as to be almost indistinguishable.”

Now, it’s not a holding. But I read that case as indicating that the court clearly was of the view that this is a wanton crime, but they did not reach that question. Before they reached that question the petitioner had to establish that it was done in connection with the activity of the PLO.

Senator DODD. Professor Rice, if I might just jump in, as I read it, even had they established, had the petitioner established that it was incidental to PLO activity——

Mr. RICE. Then they would have reached the wanton crimes question.

Senator DODD. But there is no indication in this opinion that even had they made that linkage, they would have ruled otherwise.

Mr. RICE. I think what I have just read is an indication that they would have ruled that he was extraditable.

Senator DODD. Not necessarily. I think that is a leap, as I read the opinion. It says that that’s an important question, obviously, that if you can establish an incidental relationship between the act and the political activity, it would strengthen the petitioner’s case.

But the court nowhere in this opinion suggested that had that test been met, they would have reached a different conclusion.

Mr. RICE. Well, the comment that I just read, in which they say that this is so closely analogous to the anarchist activity in the English case of *Meunier* as to be almost indistinguishable indicates——

Senator DODD. Please don’t misunderstand. I am not disagreeing with you in this particular case.

I just think, to use the conditional tense, that this kind of relationship would have concluded or would have drawn the court to conclude absolutely that it was an extraditable offense is a leap that people are making in this particular case that is not evident by the language of the court.

Mr. LUBET. I believe that the seventh circuit would have done what Professor Pyle suggests.

Senator DODD. It’s pure speculation.

Mr. LUBET. No, no; I’m agreeing with you, Senator.

Senator DODD. Oh, all right.

Senator EAGLETON. Well, then, it’s not pure speculation if you agree with the Senator. [Laughter.]

Mr. LUBET. I think you are right about the manner in which the seventh circuit opinion would probably have gone.

The problem is that other courts have not followed it, and in particular the district court in the *Quinn* case did not follow it. In fact, I’d never seen a district judge use such derogatory terms—well, I

guess once or twice. But not often do you see district judges use such derogatory terms about court of appeals opinions.

The judge in the *Quinn* case called it emotionalism and said we can't be emotional, we have to be detached. He just excoriated the seventh circuit for extraditing Abu Eain. There I think it is beyond speculation that that judge would not have applied the so-called wanton crimes exception to the *Abu Eain* case. He as much as said so.

So as steadfast as one believes the seventh circuit might be—and I take some pride in the fact that they cited my own work seven or eight times in the course of the opinion—it is only one court of appeals decision. It is not binding outside of the seventh circuit. Several other courts have indicated a strong willingness to go the other way.

Mr. RICE. Look, what this is is the judicial process at work. The *Quinn* case, as a matter of fact, is now pending.

Interestingly, the charges two through seven, which were charges of attempting and participating in the letterbombs and the timebombs through the mail, were dropped, and what they are relying on is the first charge, No. 1, which is the murder charge for the murder of Constable Tribble, which involves a question of probable cause, a different problem. The eighth count involves conspiracy to participate in bombings, including the letter- and timebombs.

Now, I don't know what the—

Senator EAGLETON. Those are the timebombs, the letterbombs with his fingerprints on it?

Mr. RICE. Yes, sir.

I don't know what the significance of that is except that the ninth circuit—

Senator EAGLETON. Does it make much difference who licks the envelope or who sits around and fills it up?

Mr. RICE. Well, the question here is difficult because they have had that case for almost 1 year.

Senator EAGLETON. You are not here as an apologist for Mr. Quinn or the *Quinn* case, are you?

Mr. RICE. No.

What I am saying is that the judicial process is working here and it would be unwise to try to short circuit it.

Senator EAGLETON. It would be working if he goes back to Northern Ireland.

Mr. RICE. Well, I think what we have to do is look and see what happens.

The place to argue the *Quinn* case is in the ninth circuit and not here. What we have to do is to recognize that this is really essentially a judicial function and that we ought not to short circuit it by trying to deal with it a priori. Not even the European Convention on the Suppression of Terrorism deals with it that way, because they leave the openings for the rule of inquiry and for the political offense exception.

Senator TRIBBLE. Senator Eagleton.

Senator EAGLETON. This is to Professor Rice and Professor Pyle.

I stipulated earlier, before some of my brethren arrived, that I personally believe there is a civil war in Ireland. I do not agree

with the State Department's cockamamie notion that there is no civil war there because people can vote.

We had the Civil War in the United States where people could vote. Spain had a civil war where people could vote. Greece had a coup, which is a form of civil war, where people could vote. They had a civil war because people did vote one way. Papandreou, the elder, came in, and then the colonels said we don't like him and threw him out.

So I don't subscribe to the notion that because some people can vote, you don't have a civil war. There is a civil war in Ireland. OK.

Now let's talk about this because this treaty may become a precedent. That's what all the witnesses have said. Mayor Flynn is worried about it and the professors are worried about it.

Let's look at the PLO precedent.

Is the PLO at war with Israel, Professor Rice?

Mr. RICE. In a state of declared war?

Senator EAGLETON. Yes. Is the PLO at war with the State of Israel?

Mr. RICE. I would have to say that that's the kind of question that has to be decided by a court in terms of—

Senator EAGLETON. Oh, come on now.

Mr. RICE [continuing]. Of course they are at war, but it is not a declared war.

Senator EAGLETON. You are free here to say that there is a civil war in Ireland, so is the PLO at war with Israel?

Mr. RICE. War, to me, means a declaration of war, so the answer is no. If you are talking about a rebellion—

Senator EAGLETON. Well, the PIRA, I guess they have issued a document declaring war on Margaret Thatcher.

Mr. RICE. Is the PLO involved in guerrilla warfare against Israel—of course. Of course, certainly.

Senator EAGLETON. Thank you.

Professor Pyle.

Mr. PYLE. Yes. I agree that there is an uprising against Israel.

Senator EAGLETON. There is an uprising. And uprisings lead to political exemptions, right?

Mr. PYLE. That is right.

Senator EAGLETON. Who else is the PLO in an uprising with or in a war with? How about France?

Mr. RICE. Well, I don't know. I am not an expert on that.

Senator EAGLETON. Well, you are an expert on extradition, an expert on political exemptions, an expert on uprisings, when people ought to be returned to a demanding or requesting state. I am just asking, in your opinion, if you were a magistrate sitting out there in Terra Haute, IN, or in South Bend, IN, is the PLO at war with France?

Mr. RICE. If there were a case that came up involving somebody who was wanted by France for doing something in France—

Senator EAGLETON. For a bombing.

Mr. RICE [continuing]. Which was alleged to be a political offense, the question would be, first, was there an uprising; second, was this in furtherance of the uprising; and then you would reach, in my view, the wanton crimes exception.

Senator EAGLETON. But you have no judgment whether the PLO is at war with France?

Mr. RICE. At war with France?

Senator EAGLETON. Yes, or in an uprising with France.

Mr. RICE. I think they are at war with humanity at large in many respects. I think what you are dealing with there is a situation that very definitely illustrates what the terrorist problem is about.

Now I think the question here is that that is not at all the problem of Northern Ireland.

The situation in Northern Ireland is unique.

Senator EAGLETON. Forget Northern Ireland.

Is the PLO, Professor Pyle, at war with France, or in an uprising status with France?

Mr. PYLE. No.

Senator EAGLETON. How about the United States, Professor Rice? Is the PLO in an uprising, in a war, in an embattled situation, in a contentious situation, where deaths may occur, whatever description you may want to give to it, with the United States, where the political exemption doctrine might apply?

Mr. RICE. Is there an uprising in the United States fomented by the PLO?

Senator EAGLETON. No, no. The PLO vis-a-vis the United States. Are they in any kind of a situation where a PLO individual could request a political exemption if we demanded the extradition of a certain individual?

Mr. RICE. Look. What he has to show in order to get that political exemption is——

Senator EAGLETON. Probable cause, what have you.

Mr. RICE [continuing]. No, no, not just probable cause. He has to show that there is an uprising involved and that what——

Senator EAGLETON. No, this is a war.

Mr. RICE. Uprising. The courts say an uprising. That there is an uprising involved——

Senator EAGLETON. But wars are uprisings of a sort, aren't they?

Mr. RICE. But not all uprisings are wars, and not all wars are uprisings.

What he has to show is that there was an uprising and that his action, bombing the market, or whatever, was in furtherance of that uprising.

Now, once he makes those showings, then in my view you reach the wanton crimes exception. And if a guy falls——

Senator EAGLETON. Well, I have not described what this PLO guy has done yet.

Mr. RICE. That's right.

Senator EAGLETON. But I will describe it in a minute.

What about you, Professor Pyle? Is the PLO at war with or in an uprising situation with the United States?

Mr. PYLE. As a general proposition, no.

Senator EAGLETON. As a general proposition, no.

Mr. PYLE. But the part of your question that bothers me is that at one point in the Middle Eastern dispute, the U.S.S. *New Jersey* shelled positions in the mountains behind Beirut.

Senator EAGLETON. It did, intensively.

Mr. PYLE. That created a war-type situation.

Senator EAGLETON. Yes, it does.

Mr. PYLE. In that particular context, I think that a foreign court might conclude that the United States was in a general sense at war with—

Senator EAGLETON. OK. So then, the political exemption, under certain circumstances, could apply with the United States requesting extradition of a PLO individual from a state with whom we had an extradition treaty?

Mr. PYLE. Can you give me an example of the kind of case you have in mind so that I can be sure to answer your question correctly?

Senator EAGLETON. I'll give you the Abbas case.

Mr. PYLE. I'd be glad to address that.

Senator EAGLETON. Abbas gets back to Italy, our "friend" Italy. Somebody said we have a smooth, working relationship with Italy. And Italy is now going to request him back, if they can find him—in South Yemen or wherever he can be found. So Italy wants him back.

Let's say he gets back to Italy and we ask for extradition on Abbas and he says no, I'm a political type, I'm a political mastermind, the United States is sending all those guns to Israel. But for the United States sending all those guns to Israel, our problems would not exist. And they bombed with the battleship *New Jersey* and they killed a lot of our people so doing, and they conspired with other individuals to do us in in Lebanon, there were a lot of murders, and we are at war with those guys. So I am a political operative, he will say, and I don't want to be extradited and I plead the political exemption in an Italian court.

Mr. PYLE. I believe that the wanton crimes exception to the political crimes defense should be applied to all persons involved in the seizure of the *Achille Lauro*.

Senator EAGLETON. The wanton crimes exception.

What inquiry should Italy make as to the composition of the jury before whom he will be tried in Manhattan, if the Attorney General decides to file the case in the Manhattan district and the makeup of the panel it could be shown are in some respects substantially Jewish.

Mr. PYLE. Well, that would not necessarily be a disqualification.

Senator EAGLETON. That would not. He'd get a fair trial.

Mr. PYLE. But I think it would be appropriate for a foreign government to review indicia—

Senator EAGLETON. So we'll give Abbas some good due process over here when we get him, won't we—when we get him?

Mr. PYLE. I think it would be appropriate for a foreign court to look into the capacity of American courts to do justice. As you know, there have been occasions in our history where our courts have not done justice and where some of our judicial systems were systemically unfair.

Senator BIDEN. Will the Senator yield for a minute?

Senator EAGLETON. No, I won't.

When we sent that PLO fellow to Israel—

Mr. PYLE. Abu Eain, yes.

Senator EAGLETON. We're certain that he'll get due process in a fair trial in Israel?

Mr. PYLE. I was not.

Senator EAGLETON. You're not certain?

Mr. PYLE. No, because I have looked at the treatment of Palestinians in the West Bank area, and looking at it as a systemic question, I was not convinced that the Israeli Government was capable of handling that case fairly. And, from what I have heard about his return, I have some serious doubts as to whether, in fact, he was treated fairly.

However, I should add that the State Department also had doubts, and that is why it agreed to surrender him, but on condition. And that is the kind of inquiry I am advocating. But that does not foreclose—

Senator EAGLETON. So you would be dubious about returning any PLO individuals to Israel. You'd make a pretty thorough inquiry because you'd be dubious as to the kind of justice they would get over there?

Mr. PYLE. Yes. And also, I do not believe that Israel is a democracy with respect to the Arabs and the Palestinians under its jurisdiction at this time.

Senator EAGLETON. So if more PLO activists, bombers, what have you, came here, you'd make a pretty good look into that?

Mr. PYLE. I would have to. I think, to be consistent with such principles, to be neutral, and to be principled, we would have to do that.

Now you still may surrender the suspect but on condition that he be treated fairly.

Mr. LUBET. It has to be pointed out—excuse me for interrupting—that there was no conditional extradition in the *Abu Eain* case. It is just an inaccurate statement.

There were no conditions attached to the extradition. He was tried by a civilian court, and the Israelis did file their complaint against him at the outset in a civilian court. That may well have influenced the State Department, but it was not a case of negotiated, conditional extradition.

I attended the trial in Israel.

Mr. PYLE. Thank you.

My information is different, but, even if my information about this case is wrong, my analysis would still hold, as there have been other cases where our State Department has established conditions to insure that justice be done.

Senator EAGLETON. Now, Professor Pyle and Professor Rice, let's try to end this war in Northern Ireland.

Let's assume another Sunningdale comes along. Let's assume there is a power-sharing government. Let's assume John Hume, previously mentioned in the testimony, is part of the cabinet along with other members of his group, some Protestants are a member of the group, and it is a reconstituted power-sharing government.

Is the civil war at end in Ireland?

Mr. RICE. Senator, are you talking to me?

Senator EAGLETON. Either one.

Mr. RICE. I think that would depend on the proof that would be brought up at that time. My point here is that the question—

Senator EAGLETON. Depend on what?

Mr. RICE. On the proof that is brought up in the particular case.

Senator EAGLETON. But I just gave you the proof—a new Sunningdale type government, Brian Faulkner III is Prime Minister, John Hume is Secretary of Commerce and Transportation, and they meet with Catholics and Protestants participating, shaking hands, and we're going to try to make this government work.

Is the civil war at end in Ireland?

Mr. RICE. I think, given the reality of the British occupation of Ireland for eight centuries and the ongoing war that has occurred there, I agree completely with Cardinal O'Fey, who said, and I quote: "Absolutely, there is only one solution—the British must get out."

I think the answer is as long as they are there——

Senator EAGLETON. So you're saying the PIRA can continue the civil war as long as it wants?

Mr. RICE. No. No. What I am saying is that the activity by the IRA is a symptom, not a cause. It must be remembered that on August 16, 1969——

Senator EAGLETON. So power sharing would not end the civil war?

Mr. RICE. Probably not. I have no crystal ball.

Senator EAGLETON. All right.

Mr. Pyle.

Mr. RICE. May I say one thing, Senator.

On August 16, 1969, when the British Army intervened, there was no IRA. There was no functioning IRA. The IRA then came back into being. It had practically disbanded.

Senator EAGLETON. We're trying to get them out of being.

Mr. RICE. I know.

They are a symptom of what is wrong with the society. I do not expect that anything short of a commitment to a withdrawal in a reasonable time will do it.

But we are not here to issue prognostications. We have no crystal ball.

Senator EAGLETON. No. But if the power sharing government goes in and the PIRA continues its bombing, and PIRA bombers still flee to the United States and we give them asylum, I want to know whether you would continue to apply the political offense exemption, because they don't like Sunningdale, they don't like Hume, they don't like Brian Faulkner III.

Mr. RICE. There have been efforts over the past——

Senator EAGLETON. They don't like anything. They just like bombs.

Mr. RICE. You don't have to agree with a political rebellion in order to recognize that it is a political rebellion.

Senator EAGLETON. They can still continue.

Mr. RICE. Maybe.

Senator EAGLETON. Professor Pyle.

Mr. PYLE. The scenario that you hypothesize might very well lead the PIRA to so lose political support that——

Senator EAGLETON. But not to lose their bombs.

What can they do with their bombs?

Mr. PYLE. Please let me finish, if I may.

It may cause them to so lose their political support that a judge could no longer rule that an uprising exists. And if that were the case, then those people would be extraditable, just as the Red Brigade, or the Baader Meinhof Gang, or other organizations which do not have the broad popular support required by the uprising test would be extraditable.

The uprising test is very useful in that sense.

Senator EAGLETON. Thank you, Mr. Chairman.

Senator TRIBLE. Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

This has been interesting to listen to.

I guess I want to focus on one thing, particularly on something in Professor Pyle's testimony.

You suggest on page 21 of your testimony that the law of extradition ought to be uniform, and the proper way to solve this problem, if there is a problem, is by legislation and not sporadic treaties. You go on in the next page to make a rather interesting statement, where you say,

Nor is it better to have decisions of this sort decided by two branches rather than one, when the two branches are subject to all of the impressionable judgments, diplomatic pressures, partisan loyalties, and distractions common to the politics of the Executive Branch and Senate. The issue is not how many branches are involved, but how carefully the decisions are made and how uncorrupted they are by considerations extraneous to the doing of justice.

You are suggesting that none of those judgments, pressures, loyalties, and distractions are endemic in the court system?

Mr. PYLE. No, I wouldn't go that far.

Senator EVANS. You've heard of the difference between the conservative and the liberal parts of our Supreme Court?

Mr. PYLE. Yes.

Senator EVANS. You understand that the President now, if given a vacancy, is going to look very carefully at the background, presumably political, moral, ethical, of Justices he will appoint.

Mr. PYLE. Certainly.

Senator EVANS. So how, then, do you determine that one branch is inherently better than the other when all three branches are subject to exactly the same oath, which is to uphold the Constitution of the United States?

Mr. PYLE. It is a question of degree. I think the question of degree is very significant.

Senator EVANS. Professor Pyle, let me continue with you. I heard earlier testimony—if I remember hearing it right—that one court was calling another's decision emotional.

Mr. PYLE. Yes.

Senator EVANS. Do you know how the system of extradition works between States of the United States?

Mr. PYLE. Yes.

Senator EVANS. Who has the final say?

Mr. PYLE. In the United States we have a Supreme Court and a judicial system that is superior to—

Senator EVANS. No. I mean who has the final say in the determination of extradition between States, where States have extradition agreements one with another?

Mr. PYLE. The Constitution requires that each State return fugitives.

Senator EVANS. Do you know who issues the final decision in that respect, State by State?

Mr. PYLE. Well, the State Governor, I believe, makes the judgment. But that is a reviewable judgment, as I understand it, so perhaps it is the courts that make the final judgment.

Am I incorrect on that?

Senator EVANS. I think you are not correct on that.

Mr. PYLE. Do you mean if the Governor of the State of Massachusetts refused to send to the Governor of the State of Washington a particular person sought under a proper warrant, that that could not be litigated?

I believe it could be, and I believe the Governor of Massachusetts could be ordered to surrender him up. Am I in error?

Senator EVANS. I had the opportunity on a number of occasions during the 12 years I was Governor of Washington to refuse extradition, and that was it.

Mr. PYLE. Well, that's very interesting.

Senator EVANS. But you would suggest that that is a bad system and that it ought to be turned over to the courts?

Mr. PYLE. I think that judgment ought to be reviewable, yes, I do.

Senator EVANS. So you would turn all of those over to the courts.

Professor Rice, did you have a comment?

Mr. RICE. I would agree with you on that, Senator. It's a function of the political question, which is part of our constitutional law. It operates in that case generally to the benefit of the accused. Interstate extradition does not involve turning an accused over to a foreign country with legal procedures that are abusive of individual rights.

The point I wanted to make before is that we tend to lose sight of the fact that extradition is fundamentally an individual proceeding. We tend to lose sight of the extraditee here. That is why it seems to me that it is dangerous to try to handle this by a priori formulations and by policy decisions and by conjectures about the PLO and all the rest of it.

What we are concerned about is an individual whose extradition is sought on the basis of a communication from a foreign government which does not have to produce a single witness, which does not have to subject itself to cross examination, and the point here is that our courts have been handling that in a proper, prudent manner. But I think we are going to an extreme here if we suddenly throw the baby out with the bathwater and decide that we are going to make this an absolute rule, to try to freeze this in some kind of legislative formulation.

We went through that in the 19 century, with the mania for handling everything by legislation, and it has not worked. Courts do have a proper role.

I believe that that is one of the main reasons why this treaty is imprudent—because it does interfere with the courts.

Senator EVANS. Professor Pyle, at least as I understand it, was suggesting that this be done by legislation, presumably legislation that is uniform. I guess the fundamental question is is that appro-

priate when dealing with, what, 160 other nations, most of them too tiny to even approach the smallest of the United States.

Mr. RICE. Well, sir, in my opinion, I think we would differ on that. I see a very limited range for legislation here. Perhaps legislation to establish a limited rule of inquiry, but beyond that, the legislative function is not really the proper vehicle to handle this.

Senator EVANS. So you would suggest that it be done by treaty?

Mr. RICE. Oh, no—neither treaty nor legislation. I think the proper handling of this thing is in the courts. Even the conventions that we have on hijacking and hostage taking and so forth probably are duplicative of the wanton crimes exception. But I have no objection to that.

It's just that I am cautious about the idea that we can solve everything by writing it down in black and white. I don't think that's proper, especially in this case, because of the unique—and I underline unique—character of the Northern Ireland situation, where you have an occupying army and you have an indigenous guerrilla army resisting that occupying army. That is a completely different situation.

Senator EVANS. But that is hardly unique.

Mr. RICE. No. But it is unique in terms of the history of Ireland, and in terms of the fact that for the past 60 years they have been ruled under continuous emergency powers—the longest period of emergency power rule in the Western World. It is a system where I think it is imperative that the Senate before passing on this treaty get that first-hand expert information on what actually is going on there.

Senator EVANS. But if you do not have the fundamental framework, either through appropriate legislation that covers this general field or an extradition treaty, you have nothing to work from. What do the courts depend on then?

Mr. RICE. But I think you do have the framework. You have the treaty.

Senator EVANS. Are you satisfied that the current framework is adequate and no extradition treaty is needed?

Mr. RICE. No supplementary extradition treaty, yes. I think the United States will extradite only pursuant to treaty, and I think that is proper.

But I don't think you need this supplemental treaty.

Senator EVANS. Do you need the original treaty?

Mr. RICE. I think it is perfectly proper to say, as our courts have said, that we are not going to extradite without a treaty because this is a government of checks and balances and separation of powers. The President has a role here in making the extradition treaty, and the American courts have properly said that we won't extradite unless there is one.

But I think we would be going far afield if we intruded either the Congress or the executive into decisions that are, in my view, of their nature judicial.

Senator EVANS. Mr. Hannay or Mr. Lubet, do you have any comment?

Mr. HANNAY. Well, it seems to me that it is quite the other way around. Far from being something that is uniquely judicial, it is, if anything a decision uniquely legislative and executive. The foreign

relations responsibility rests with the executive, and in turn upon the Senate for its advice and consent. If there is ever a time that the Senate should be involved, this is it. You need not wait for some judge to do something. You have the opportunity to examine the issue yourself.

There is a decision tree here. You start out at the top and make a decision on the first question: Should our theory be that political violence is OK, as a general proposition? And the answer to that is going to be "no."

Then you ask: Are there any situations where it might be OK? Well, OK, Nicaragua and the Contras. That is a real problem area for us. OK, so let's carve that out. How do we do that? What principled rationale can we use to carve that out? Well, they don't have a democratic government and we don't want to get involved with them. So let's focus on countries that do have democratic governments.

So on our decision tree we move over to the side with democratic countries. Next question. Does the United Kingdom have a democratic government? Yes. You make your inquiry; you determine that they do, that they are an acceptable ally and friend, someone that we can trust. So we continue on down the route.

Then you reach another step in the decision tree, which is what Professors Pyle and Rice have been talking about, which is the concept of "noninquiry." Traditionally, as Senator Eagleton says, it has been delegated to the executive—not the legislature and not the judiciary. Let's reanalyze that. Should you, as the legislature, have a role in that?

Yes, I think it is appropriate for you to make a general determination as to whether the political-judicial system is one that we find acceptable. You make that determination. You analyze the material that you have been asking for, and then you make that general determination.

Then is there a role left for the courts? Absolutely. In the extradition process, there is definitely a role for the court.

As the Senate, you have already made some fairly significant determinations on the way. But the courts are the ones to determine whether there is probable cause and that protects personal liberties. They are still the ones who determine the application of the treaty.

Senator Kerry asked about particular language and particular provisions under article I relating to intent. The courts have a role in determining the meaning of the treaty's language at least to the extent that there is no legislative history to guide them.

There is a role for the judiciary, but not with respect to an "inquiry" into the political-judicial system of the requesting state. When would that happen? Assuming extradition is granted by the court, the case goes back to the executive. The executive branch makes that individualized, case-by-case determination, which they have been doing for 200 years, and doing, for all intents and purposes, quite well.

So that is my response. I think it is quite clear.

Senator BIDEN. Would the Senator yield for a very brief intervention?

Senator EVANS. I will be kinder to you than the Senator from Missouri. [Laughter.]

Senator BIDEN. Well, you are all very nice and this will be the first time I am allowed to speak.

Thank you, Senator. [Laughter.]

Let me ask you this.

Would you acknowledge, sir, that the question of the nature of the courts in Northern Ireland might appear much further up on the decision tree, that it could appear up at the part of whether or not we are dealing with democracies or what kind of system we are dealing with? Isn't it equally as logical for it to appear there?

Mr. HANNAY. Sure, it would, as part of a generalized analysis. But it is also a more central issue, further on.

Senator BIDEN. I'm not suggesting that it is not. I just wanted to establish that when I got to my line of questions.

Thank you very much, Senator.

Senator EVANS. Professor Lubet, do you have any comment on this general issue?

Mr. LUBET. It seems to me quite obvious that since the political offense exception exists only by virtue of a treaty, and since the creation of treaties is reserved exclusively to the executive, with the advice and consent of the Senate, the executive and the Senate therefore have the right, if not the obligation, to define what they mean when the treaty is enacted. This is not to say that a treaty is invalid without the definition. But it is a completely logical extension of the treaty-making process to define the terms that the treaty uses.

Senator BIDEN. Will the Senator yield one more time, and I promise I won't interrupt again?

Senator EVANS. Certainly.

Senator BIDEN. Professor, you said the political offense exception exists only because of a treaty.

That, in fact, practically is not the case. Is that not true? Has not the executive branch, as Mr. Hannay has pointed out, ultimately made the judgment? Is it not true that the political offense exception has existed, de facto, for 200 years? Aren't you being a little strained in suggesting that it only exists because of the treaty?

Mr. LUBET. It has existed in treaty and in one or two instances, de facto, for 200 years, as it should have, but, nonetheless, a treaty would be valid if it omitted it entirely.

Senator BIDEN. I am not suggesting anything. I just wanted to point out, professor to professor, that we should be precise. And you pointed out earlier how precise you were.

Thank you again, Senator.

Senator EVANS. I am not sure that this last is a question or an observation.

Professor Pyle, with your concern that the executive and legislative branches are subject to impressionable judgments, diplomatic pressures, partisan loyalties, and distractions, are you going to feel very comfortable with any arms control agreement that is negotiated this fall coming before the Senate for ratification?

Senator TRIBLE. Or what other responsibilities should we give up in the exercise of our constitutional responsibility?

Senator EVANS. Or what, if any, should we retain?

Mr. PYLE. My point there is this. When you adjudicate the fate of an individual, who is protected by the Constitution of the United States, and protected by the due process clause, and the writ of habeas corpus, you have to put that into the forum which is most capable of making a dispassionate judgment. That is my point.

If I overstated my point, I apologize.

Senator TRIBLE. So we should return that, then, to a magistrate or to a Federal district court judge?

Mr. PYLE. I would have no objection if, in the legislation that the House committee is working on, these decisions were to be transferred to district court judges. But I would have to say that on my reading of the cases, I have seen poor opinions and good opinions from both kinds of adjudicators.

Senator TRIBLE. Would you yield to me for a moment?

Senator EVANS. No. I shall yield the whole floor.

Senator TRIBLE. Oh, I want you to yield to me. I want to follow the Biden exception and ask two quick questions. [Laughter.]

Senator BIDEN. I hope I get a chance to ask a whole bunch of questions.

Senator TRIBLE. You will, you will. But I just want to ask these questions before I surrender the floor to my colleague because I may not have another chance.

There was some discussion, some colloquy, with Senator Eagleton about a political uprising and how you define that term.

Can one person constitute a political uprising?

[Pause.]

Senator TRIBLE. Professor Pyle I see is shaking his head no.

Professor Rice.

Mr. RICE. I think in the abstract that is the correct answer. No.

Senator TRIBLE. How about 300. I'm told there are about 300 active members of the PIRA. Does that constitute a political uprising?

Mr. RICE. I think that's the kind of issue where it might, and I think I would leave it with the courts.

The thing we have to remember is that the treaties are made by the President with the advice and consent of the Senate, but they are also the supreme law of the land. The treaty is law and the courts have a function in interpreting it.

This is precisely the kind of issue that should be determined by the courts, and you cannot set a limit. You cannot write a treaty and say if there are only 300, it won't work or it will work.

This has to be handled by evidence in a particular case. It would be very difficult to imagine a single person constituting an uprising in terms of the political offense exception. But clearly the situation in Northern Ireland, whether you agree or disagree with paramilitary activity is, as Sean MacBride, who disagrees with it has said so eloquently, a political rebellion, and there's no way to get around it. It is a unique situation.

Senator TRIBLE. So, somewhere between 1 and 300 you would pass the threshold?

Mr. RICE. I would not even quantify it. I think that is misstating the entire problem. It's not a question of numbers. It's a question of the reality of there being an insurgency in an area that qualifies

within the terms of what the political offense exception is all about.

Senator TRIBLE. Senator Kerry.

Senator KERRY. Mr. Hannay and Mr. Lubet, I would like to ask you about the view, since you are advocating that we change this, can either of you tell me how many times in the last 20 years Great Britain has requested extradition?

Mr. HANNAY. The number that I saw in answers to questions supplied by the Department of State was, I think, something like 64 times, if I recall.

I could look it up. I have it here, but I don't recall specifically the number of requests overall.

Senator KERRY. Sixty-four?

Would you agree with that, Mr. Lubet?

Mr. LUBET. That is my information also, Senator.

Senator KERRY. And you would agree that that is not a complete list, is that correct?

Mr. LUBET. As I understand it, there is no complete list.

Senator KERRY. So we know of 64 cases. How many have been denied? How many requests for extradition have been denied?

Mr. HANNAY. The ones that have been denied with respect to the political offense exception are four, two of which are still sub judice.

Senator KERRY. So four, correct?

Mr. LUBET. Correct.

Senator KERRY. What about with respect to other countries? Can you cite examples of denials that you would want to call to the attention of this committee?

Mr. HANNAY. There are several. The *Artukovic* case, which, in fact, is still sub judice itself, was an attempt to extradite an alleged Nazi war criminal, or perhaps I should say a Nazi political criminal, back to Yugoslavia. They have been attempting to do that for some 20 years. Extradition has been denied, and now deportation proceedings are underway. There is considerable question about that one.

Senator KERRY. And how many requests were there? That was to—what?

Mr. HANNAY. That was from the United States to Yugoslavia.

Senator KERRY. And how many requests from Yugoslavia have there been?

Mr. HANNAY. I have no idea, I'm afraid.

I'm prepared to concede, if this is the line you are going down, that there have not been very many instances in which extraditions have been denied as a result of the political offense exception. I am perfectly prepared to concede that.

Senator KERRY. So, it is fair to say, then, and you will concede, that this is not a situation of rampant abuse suddenly says that magistrates have gone so wild that there is a historical imperative here that mandates a change. Is that correct?

Mr. HANNAY. No, I wouldn't agree with that.

Senator KERRY. Well, didn't you just say that?

Mr. HANNAY. Did I say that?

Senator KERRY. Didn't you just say that?

Mr. HANNAY. That there were not many instances—I did say that. But that's not the point.

The point is that it is like the Abbas incident in Italy. One incident is enough to be one too many, and that is our point.

Senator KERRY. The current treaty—you are familiar with the principles of the current treaty, correct?

Mr. HANNAY. Yes, I believe so.

Senator KERRY. The current treaty says—if I can find it—first, do you agree with the basic principles of the current treaty that is in existence?

Mr. HANNAY. I'm not sure what you're referring to. If you're referring to the concept of a political offense exception, absolutely.

Senator KERRY. What about the notion of article III, which sets forth that extradition will only be granted for the act, the facts of which disclose an offense within any of the descriptions listed in the schedule, which is an integral part of the treaty: (a) The offense is punishable under the laws of both parties.

Mr. HANNAY. Yes.

Senator KERRY. Do you agree that the offenses ought to be punishable under the laws of both parties?

Mr. HANNAY. That is a traditional concept within extradition treaties, and I agree with it.

Senator KERRY. Is that a traditional concept to which we ought to adhere?

Mr. HANNAY. Yes.

Senator KERRY. With respect specifically to the proposed treaty, then, do you believe that the making, the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life is a crime in the United States?

Mr. HANNAY. My recollection is that there are State statutes similar to that within the United States.

Senator KERRY. You can't cite any, though, because I can't.

Mr. HANNAY. I'm sorry, you cannot?

Senator KERRY. I can't, no. Can you?

Mr. HANNAY. I have none specifically in mind. But I would be happy to look for you, if you would like.

Senator KERRY. Let me ask you how that would work. If somebody possesses a firearm and he intends, either himself or through another person, to endanger life, does that require that we prove that they intend to endanger life with the use of that firearm, or do they merely intend to endanger life in any other way but, because they possess a firearm, they are then extraditable?

Do you know.

Mr. LUBET. May I answer your question, Senator?

Senator KERRY. Can you?

Mr. LUBET. I can try.

Senator KERRY. Is that clear here?

Mr. LUBET. I think your question is clear.

Senator KERRY. No, not my question. Is it clear here as to what the answer to that is?

Mr. LUBET. The section that you are reading does not define a crime for the purpose of extradition, so the section that excludes possession of a firearm with the intent to endanger life does not

define an extraditable offense within the meaning of the scheduled terms of the treaty.

What it does is talk about which of the scheduled crimes would be extraditable and could not claim the political offense exception. It does not overrule the rule of dual criminality that is found in the basic treaty.

So, in the absence of a charge that constituted a crime in the United States—and I agree with you that these words, as they are written, probably do not constitute a crime in the United States—in the absence of such an actual charge being brought, there would not be extradition.

What that section does is give further understanding to the application of the political offense exception to dual criminality offenses. So, for example, if the individual were charged, say, with attempted armed robbery, which is a crime in the United States and is a felony, at least in my State, and in the course of that he possessed a firearm or it was shown that he intended to endanger human life, then the attempted armed robbery, the dual criminality offense, would not come under the political offense exception.

But I emphasize that this supplement does not abrogate the existing treaty, and you still must charge a dual criminality offense.

Senator KERRY. But what it does do very clearly is set forth that that is a specific reason for which one would not have a political offense doctrine available to them?

Mr. LUBET. Yes, sir.

Senator KERRY. But isn't there a vagueness, per se, in what we are denying someone as a consequence? I mean, there is a duality to what they can or cannot claim with respect to the political offense doctrine, isn't there, on its face?

Mr. LUBET. Well, it does not appear vague to me on its face, Senator.

Senator KERRY. That's not vague? I mean, can you tell me whether or not, if they had the gun, you'd have to prove whether or not they were going to endanger in order to know whether they would have the political offense?

Mr. LUBET. Yes. There would have to be proof, and the proof either—

Senator KERRY. But it doesn't say that.

Mr. LUBET [continuing]. Would be forthcoming or it would not be forthcoming.

Senator KERRY. Well, isn't it fair to say that that is your interpretation of it? Isn't that correct?

Mr. LUBET. That's fair to say.

Senator KERRY. But it's subject to someone else's interpretation, too.

Mr. LUBET. Yes, sir.

Senator KERRY. So, it is not clear.

Mr. LUBET. Well, by that argument nothing is clear because everything is subject to a variety of interpretations.

Senator KERRY. Well, I thought we were trying to be clear here. Isn't that the point?

It seems to me that you have just underscored the danger in categorically removing a political offense exception—because nothing is clear. That is exactly the point we are trying to make here.

Mr. LUBET. Well, that danger applies——

Senator KERRY. And it ought, therefore, to be subject to an interpretation in each case, not categorical exclusion in each case.

Mr. LUBET. The notion of categorical exclusion does not exclude, if you will, interpretation. One must still apply the exclusion. That is what you are saying to me, Senator.

Senator KERRY. But that is exactly what exists.

Mr. LUBET. That will be the case no matter how the treaty reads.

Senator KERRY. That is exactly what exists today. The current treaty simply says the offense for which extradition is requested is regarded by the requested party as one of political character, subject to interpretation. The appendix is very clear as to what offenses you can be extradited for, subject to that—murder, manslaughter, maliciously wounding or inflicting grievous bodily harm, kidnaping, abduction, false imprisonment, and so on. All are subject simply to interpretation according to standards of behavior.

Mr. LUBET. And the amendment clarifies the interpretation.

Senator KERRY. Well, I guess there is an argument as to whether it clarifies it or denies it and as to what discretion is left there.

With respect to that, why should we not, given the fact that everyone is in agreement that there have not been a lot of instances here of what one might want to characterize as abuse—would we not be better advised in protecting the principles of the political exception doctrine as well as the integrity of other treaties and relationships that we have? Should we not protect the integrity of our own judicial system by trying to strengthen the judicial process by which that exception may or may not be applied, rather than moving it further away from judicial involvement altogether—court stripping, in a sense—wouldn't that be a better way to come at this?

Mr. LUBET. Well, as I said before, I don't see the two as mutually exclusive.

Senator KERRY. Well, the current proposal certainly moves further away from that approach than I might be describing it.

Mr. LUBET. Well they could happen simultaneously.

But if I might, I would like to respond to the point about the small number of cases involved. Of course, there have been a small number of cases involved, although the appropriate universe to look at would be the number of cases in which the political offense exception has been raised. If you compare those two numbers, the number of cases in which it has been raised as opposed to the number in which it has been applied or granted, then the percentage zooms up. So you are not talking about a very small percentage; you are talking about a relatively higher percentage, if you look at that universe.

There is also the question about what other countries are doing and how they will follow our lead or look at the United States. The manner in which other countries have applied the political offense exception is shocking and scandalous. The Italian release of Abu Abbas they claimed was because of diplomatic immunity, but it's really another name for the same thing. And the French decision in 1973 or 1974 to release Abu Daoud, the man who planned the massacre of the Israeli athletes at the Munich Olympics was done under the political offense exception. It is a worldwide issue and

worldwide it is a more significant problem than it is in the United States.

So I think you cannot look at the smaller universe.

Now, to answer your question, Senator, about court stripping, I do not think that it is inappropriate to have both baseline legislation that applies to the world and to say under X, Y, and Z circumstances we will always extradite because if we are not willing to do it, we shouldn't have an extradition treaty with that country. So we should have some sort of baseline legislation, but then to say, as we do in every other bilateral relationship, that there are certain nations with whom we have different relationships and there we can negotiate exceptions. We do it with trade sanctions, we do it with trade favorability, we do it with a 100 other forms of foreign relations, and I see no reason not to do it with extradition.

Now, what Professors Pyle and Rice say is that Great Britain should not be one of those nations, and that, of course, is a decision that the Senate must make. I think it is appropriate for this committee and for the full Senate to examine the judicial system, to examine the political system in Great Britain and to say it either is or is not what we want it to be in order to have this treaty. I think you should make a full examination.

It is within your power to decide that their system is not sufficiently fair to warrant having this treaty. Actually, I have very little opinion about what the outcome of that inquiry should be, except to say that if you do make that decision, if you do make the decision that the United Kingdom is not sufficiently fair, is not sufficiently humane to have this extradition treaty as it applies to Northern Ireland, you can't make that decision and then call it neutrality. That would not be neutrality. That would be making a decision that attacks our ally, and surely you can do that. But you cannot do it in the name of neutrality.

Senator KERRY. Where do you come down, Mr. Hannay, on the issue of noninquiry?

Mr. HANNAY. I believe that it is appropriate for the Senate to make an inquiry at this stage. I do not believe that the concept of inquiry should be made by courts, however. I think the Senate could make a general inquiry in connection with the treaty. I think that the Executive, which has been doing it, should continue to do make its more detailed inquiry on a case-by-case basis.

Senator KERRY. Let me just understand, Mr. Lubet. Is that also your contention, that the inquiry should solely be our inquiry at this stage and not an inquiry by courts on a case-by-case basis?

Mr. LUBET. Well, there are two inquiries. There is the general inquiry about whether to have the treaty, and then, once you have the treaty, there is the specific inquiry as regards the extraditee.

Senator KERRY. Then you would concur that there ought to be a specific inquiry with respect to a particular extraditee?

Mr. LUBET. By the Executive, not by the courts. Yes, sir.

Senator KERRY. Now here, again, I am disturbed that we are departing from a principle, though maybe not the broadest one.

The court system in our country makes judgments in individual cases about the ability of somebody to get a fair trial, and, indeed, we have forum shopping by people. More importantly, we have change of venue as a consequence of those decisions. We make a

decision that you cannot get a trial because of too much publicity, you can't get a trial because you think jurors are going to be prejudiced. We go to great lengths in certain situations to adjust the venire of a jury in order to make sure that we protect them.

Why should we not have that kind of inquiry, particularly given the nature of the situation with the threshold inquiry about the court system?

Mr. LUBET. Well, first, I'm not saying that we should not have the inquiry.

Senator KERRY. But you just did so.

Mr. LUBET. I'm saying that the locus of the inquiry should not be in the court.

The reason it should not be in the court is, one, because that is the way we have been doing it for 200 years.

Senator KERRY. But the inquiry is in the court today?

Mr. LUBET. No, Senator. The inquiry is with the Executive today.

Senator KERRY. I beg to differ with you. A judge will rule as to change of venue.

Mr. LUBET. Not with regard to extradition, Senator.

Senator KERRY. No, but as regards our own jury process, our own trial for people in this country.

Mr. LUBET. But that's not what I am talking about.

In the extradition process, the inquiry is to the fairness of the foreign judicial system and today that is with the Executive.

Senator KERRY. I am merely suggesting that if we are willing to protect our citizens in our judicial system when they are put into jeopardy by making inquiry into the fairness of our system's ability to provide them with trial, I think it is not asking too much that we should make the same judgment about people that we might subject to trial elsewhere. I would warrant to you we have made that judgment in many other countries and places in the world historically, and I think we should offer no less in the situation in Northern Ireland.

Mr. Chairman, I have more questions, but I know my colleague, Senator Biden, has not even had a chance to ask any.

Senator TRIBLE. Senator Dodd.

Senator DODD. Thank you.

Let me just pick up on that last point because I think it needs to be examined a bit, that question of inquiry.

The problem I have with your suggestion is that the world is not static, that, unfortunately, we find ourselves in situations where we reach agreements with nations which change, either change fundamentally their form of government or make changes within their various forms of jurisprudence.

We probably would have argued back a few years ago that it was in our interest to have an extradition treaty with Iran, or with Lebanon, or even with the Philippines today.

We have seen the system of jurisprudence in Northern Ireland vascillate, to say the least. In 1978 the European Commission on Human Rights reached the conclusion that the British system there violated universally recognized human rights. They have modified that to some degree.

But it certainly is not beyond comprehension, if we were to ratify this treaty, given circumstances which any one here could suggest,

that the British might conclude at some later point that they need to impose very stringent measures because of the political/military circumstances in Northern Ireland.

That situation can change. In fact, it is likely to, I presume, given the volatility of the situation.

So the problem we have is that treaties are such unique agreements. Obviously a two-thirds vote is required by the U.S. Senate to approve them. They are extraordinary documents. These are not documents that we adopt by just a simple majority vote.

We find ourselves in a situation where we agree to things that have the effect of even going beyond law, in some ways, because they are deeper than that. They approach almost a constitutional issue. And because of the volatility that occurs in different places, we find ourselves locked in many ways by circumstances that we cannot control at a later date.

One of the concerns I have about this is, while it is arguable over how fair the present system may be in Northern Ireland, it is also quite apparent to me that that system is likely to change.

Were we to lock ourselves into this particular arrangement, there is nothing I can do, as a Member of the Senate, once that period has expired, except during this process and the period on the floor of the Senate, to examine all of that. Then, if the situation changes, the very people here who are advocating the ratification of this treaty might find themselves in a situation where they would deplore those circumstances, and yet, there would be nothing they can do at that point.

How would you respond to that?

Mr. LUBET. I agree with you, Senator, that flexibility is important in the issue of inquiry, and I understand your question as being limited to the question of inquiry.

The executive branch is as capable of being flexible in this area as are the courts—I would suggest probably more capable of being flexible.

Your concern that the Senate can exercise no future control applies equally if the inquiry is made by the courts or by the Executive. In either case, it is not being made by the Senate, and so you would be similarly unable to influence the decision.

The thing to point out, I think, Senator, is that for 200 years the inquiry has been made by the Executive, and following up Senator Kerry's line of questioning, one cannot point to a single abuse in granting extradition. I suppose Professor Pyle would say that the Abu Eain case was an abuse—although I would hope you would disagree with him there.

But we don't have a situation where the executive branch, over the last hundreds of years, has been abusing the inquiry power and has been sending people back to unfair judicial systems. I think the track record is fine in that regard.

Senator Dobb. But I think if you go back and you look at the historical rationale for the political exception, it relates directly to the notion that "we have no permanent friends, just permanent interests." The political exception clause was designed to protect the neutrality of this country. That was the rationale for the political exception—neutrality. And what we have tried to do with varying degrees of success over the years is to maintain that sense of neu-

trality, so that we would not be put into the position, where you had the executive branch making decisions which deprived us of that neutrality. Every time the Executive made a decision, it was tilting one way or the other, which created the problem, and hence the decision to move the political crimes issue into the judicial process to provide what you, I think very appropriately, have called in a law review article on extradition reform the "judicial shield."

I quote in your own article where you say: "The judicial shield also may serve to insulate the government from adverse international consequences in cases in which the courts ultimately approve extradition."

You cite, of course, the decision to extradite Abu Eain to Israel, which you claim was enormously unpopular both in the United States and abroad. There was a well-organized defense committee and so on. A number of Congressmen questioned the government.

Then you say, "The United States responded to this storm of protest both by defending the extradition on its merits and by invoking the fairness of the United States judicial procedures."

What I fear we are doing here with this supplementary treaty is we are limiting or constricting that "judicial shield" which has tended to protect the neutrality rationale behind the political exception. That is my concern, and I think very appropriately you identify that in your article in the Cornell International Law Journal entitled "Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists."

This supplemental treaty it seems erodes what you have very properly called the "judicial shield." It erodes the neutrality position, which historical is the genesis for the political exception clause in these treaties.

How do you respond to that?

Mr. LUBET. First, that is a separate issue from the rule of noninquiry.

Senator DODD. All right.

Mr. LUBET. In the same article that you cite, I also argued that the rule of noninquiry should be retained and that the question of fair trial and subsequent treatment should stay in the executive branch. The judicial shield referred not to the fair treatment inquiry but to the application of the political offense exception, which I believe should still repose in the courts and would under this treaty.

What would be happening is not that the decision is going to be removed from the courts, but, rather, that the legislature and the executive are going to provide the courts with the definition which the courts will then apply.

Senator DODD. A much narrower one in this instance.

Mr. LUBET. A narrower one, yes, sir. But that really also answers Senator Kerry's question.

Senator DODD. But can there be any doubt in your mind that if we were to ratify this treaty, it would be considered a political victory for the British?

Mr. LUBET. I suppose it would be.

If we were to deny it, it would be considered a political defeat. There is no neutrality either way.

Senator DODD. But to deny it would be to go with the status quo. We are going with a treaty——

Senator EAGLETON. Oh, no, no. We either reject it, or we deny it.

Senator DODD. But there is the status quo that is in the 1972 treaty.

Senator EAGLETON. If we vote it down, it is a political victory for the PIRA. If we vote it up, it is a political victory for Mrs. Thatcher.

Senator DODD. But we have a treaty. We have a treaty.

Senator EAGLETON. No. It is just that simple.

Senator DODD. There is a treaty in place.

Senator EAGLETON. I'm just telling you how the politics will play out, and you know how the politics will play out.

Senator DODD. Well, then, there is no question that it will be considered a political victory and, clearly, the neutrality question is tilted.

Mr. LUBET. Senator, I think I need to leave the political dispute between you and Senator Eagleton. I do note that there are more people here supportive of the IRA, in this audience, than there are supporters of the British Government.

Senator DODD. Well, I have tried to divorce the argument here from that. I do have a deep interest and concern about what happens in Northern Ireland, but, frankly, that interest pales in comparison to my interest in what we do to ourselves. That is my concern.

Mr. HANNAY. May I respond to that, Senator?

Senator DODD. Yes, you may.

Mr. HANNAY. First of all, I would like to point out that the issue of who determines how the political offense is to be interpreted is a matter that was first raised several years ago by the Carter administration. That administration recommended that the determination itself be withdrawn from the courts and be lodged with the executive branch, along with the issue that we have been referring to as the "inquiry" into the fairness of trials. That recommendation was picked up by the Reagan administration and carried forward.

I mention that because I think it is significant that those to whom the foreign policy execution has been entrusted, in two different administrations, have felt that the judicial shield that Professor Lubet mentioned in his article was not so necessary as to require continuation of the status quo. They felt that there were other interests more paramount. This is not to suggest in any way that it should not be of concern to you as a policy matter. But I did want to mention that by way of background.

You are right to be concerned about what we are doing to ourselves. The issue about whether this treaty is a "victory" for those who believe in a united Ireland versus those who believe the British should remain there has nothing to do with why this treaty should be supported. It should be supported because it raises a much more fundamental policy issue which goes to the issue of political violence. It goes to the issue of the right to rebel, and whether there is a limit on that within what we deem to be democratic countries.

Make your inquiry as to whether Great Britain is a democratic country. Fine. Once you have reached that plateau, then I believe

that this Senate is within its rights to say that we are not going to permit violence to be used as a political tool in democratic countries.

To deny that argument is doing something to ourselves.

Senator DODD. But doesn't that get us into an awful mess? I mean we could sit here all day, ad nauseum, conjuring up all sorts of examples where it would be politically uncomfortable for you or me to have to draw a specific conclusion.

If we are going to decide whether or not to ratify the treaty on that basis, we will make a tremendous mistake.

Mr. HANNAY. But that is the way it is presented.

Senator DODD. Of course it is, and that is the problem with it. In fact, once you get into that kind of debate and discussion, there is no end to it. What we have to be doing is standing back. Put all the nice little cases aside that we can think about and sit back and look at this thing in as objective a way as possible. Try to think long term. Have some vision in all of this and determine whether or not what we are establishing here, the system we are putting into place, is going to complicate the conduct of foreign policy for this country or not.

I think the precedent we are setting here is more inclined to create additional complications than to resolve them.

You have just cited an example where you say the executive branch has discretion. There is the *Barr* case, which I brought up before. There the executive branch had reached a conclusion that Mr. Barr should have been extradited, and they brought the matter before a magistrate in Philadelphia. The magistrate summarily rejected the claim because it was so circumstantially evidenced that it was ludicrous. It was thrown out immediately.

But the point is it says something about leaving this matter or extending the circumstances under which the executive branch can play a significant role.

Mr. HANNAY. But that role of the judiciary would not change under this treaty. The probable cause determination would still be made by courts.

Senator BIDEN. But we still have to reach your threshold in making the judgment of whether or not this is a democratic country and their system is one that we adhere to, which then means that every other country in the world will ask us and has a right to ask us, and we will then have to go down every single country and graduate or qualify them by gradation.

Senator DODD. And change those gradations——

Senator BIDEN. I cannot fathom how that helps American foreign policy.

Senator DODD [continuing]. On the basis of a treaty. You are going to change the grades all the time.

Right now we may like Marcos, President Marcos, the President does, and wants to be supportive. But it is not inconceivable that the New People's Army is going to prevail in that situation at some point, in which case, then, we have to change the rules, were we to establish a similar agreement with the Philippines.

Don't you see the tremendous complications we get ourselves into by conducting our foreign policy on that basis? Isn't it wiser for us to have a uniform standard which we apply, and legislatively

define these terms? Clearly the executive branch is involved and certainly the courts would be. But rather than create exceptions here, which then it seems to me create untold political complications for ourselves, why not have that uniform standard? Then legislatively, if you want, define these things, where we can change them periodically based on new circumstances that emerge, and so forth.

Isn't that a far wiser way for us to proceed than to deal on the emotional level of this and whether or not one likes the British Government or likes Maggie Thatcher or agrees with the IRA or does not agree with the IRA? Isn't that playing far too significant a role in something that ought to be far more serious a debate? Isn't that really the problem here?

Mr. LUBET. The Senate, of course, is called upon to make judgments similar to that all the time. Many people have said, and most disagree, that we should maintain a position of studied neutrality with regard to events in South Africa, and certainly we should not inject ourselves into their foreign affairs because who knows what the next step will be.

Now, most members of your party, and I myself, believe that that is just not appropriate, that we should enforce trade sanctions against South Africa, and the President has gone along.

Senator BIDEN. But that is not a treaty.

Mr. LUBET. But we make decisions like that.

Senator DODD. You are not putting a legislative trade sanction on the same level as a treaty.

Senator BIDEN. And there are no words of art that are controlling that sanction.

In fact, what you are asking us to do here is ratify a treaty that has terms or words of art in it, which are going to prevail. They are going to go beyond one administration.

Professor, I think your testimony has been brilliant so far, but I think you are succumbing to intellectual inconsistency here for a moment in a shoddy performance about whether or not you can compare the South African situation and a sanction against South Africa with what we have at stake here.

They are not comparable. They are apples and oranges.

Senator TRIBLE. Mr. Lubet, I would suggest to you that you cannot win this argument.

Mr. LUBET. I had not planned on engaging in it.

Senator TRIBLE. I would suggest that I find your rebuttal quite persuasive. This committee revels in making these kinds of judgments day in and day out, and the decisions wrought by this committee have far-reaching consequences. I have not heard my colleagues step back and suggest that we ought not to tie foreign aid to human rights concerns. It is a legitimate exercise, just like this is a legitimate exercise for this committee.

Senator DODD. I'm not suggesting it is not a legitimate exercise. I am just questioning whether or not we have a matter before us here that goes beyond, as it seems to me, the particulars of this particular case and really raises the question of whether or not, as a matter of policy, we ought to be engaging in supplemental treaties—treaties—with nations with whom we have a favorable rela-

tionship, and the kind of complications that raises for this committee and for this country in other matters.

Mr. LUBET. I agree, Senator, that that is a deep and complicated issue for this committee.

Senator DODD. And that is my problem. It's not the IRA, it's not Northern Ireland, it's not South Africa—but it is this country, and the conduct of our foreign policy, and the essence of trying to maintain, at least, wherever possible, a modicum of neutrality on the question of political crimes.

Mr. LUBET. But what I would want to point out, Senator, for example, is acceding to the European Convention for the Suppression of Terrorism does the same thing.

Now I don't know if we can actually become a signatory to it as I think it is actually limited to the Council of Europe. But, assuming for the moment that we were able to become signatory to the European Convention, as many opponents of this treaty have said we should do, we would be doing the same thing. Though it would apply to more countries than one, but fewer than all, it would be in many ways more of a straitjacket because we would have no control over which other countries can join the compact.

Senator DODD. But I am not advocating that. We have our own system here, and I would not want us to piggyback on that. As you well know, at least half, maybe more, of those countries have entered reservations on the political exception clause. So, the very central point already has very significant disagreement among the signatories to that agreement.

So I would not advise that course of action.

Mr. HANNAY. In practice, we can and do make distinctions between countries without concern about the discomfort that it may cause. We did that with the Philippines Treaty.

—Senator DODD. I have no disagreement on that at all with you. But let's reserve those disagreements for something other than in treaties.

Mr. HANNAY. We tried going down the route of a general definition by legislation, and we ended up with a prepared definition that was so convoluted that it wound up excluding the very thing that you started out trying to include, and including the things you set out to exclude.

Senator DODD. I have such great respect for both of you here, and you obviously are very, very bright and knowledgeable legal scholars. But I just do not detect the reverence for the Constitution and the treaty process that I think is appropriate for this kind of discussion and debate. We are not talking about a simple piece of legislation here. The treaty role, the Senate's role in the ratification of treaties is something that is extraordinary, and we should not deal with it in an ad hoc sort of fashion. That is my concern.

Mr. LUBET. Senator, I did not intend to speak to that concern, frankly. My testimony is intended to be presented to you as that of a lawyer studying the legal ramifications of the treaty. I tried—although I guess I failed—to avoid speaking to the sorts of concerns that you mentioned because those are rightfully matters of political discussion and determination to be decided upon by the Senate. I really attempted to avoid expression of an opinion.

What I do want to say is, from a legal perspective, I see no flaw, I see no problem in this treaty. Whether or not the Senate wishes to adopt it for a variety of other reasons goes beyond my expertise.

Senator DODD. Thank you all very much.

Thank you, Mr. Chairman.

Senator TRIBLE. Senator Biden.

Senator BIDEN. Thank you.

Gentlemen, I will repeat a comment I made at the last hearing that I am sure you all remember from law school: hard cases make bad law. I repeat—hard cases make bad law.

It seems to me what we have done here and what brings us all here today is we have had 4 hard cases out of 64 or however many there were, and in my view, we are about to make bad law.

I know we all say things in the heat of this discussion, and I am sorry my friend from Missouri is leaving because he might like some of the things I am about to say and may be upset with some of them.

I am going to be the one who is totally unemotional here today and suggest the following things.

First of all, all of you agree on the need, well, not necessarily the need, but the legitimacy of further inquiry by this body into the system in Northern Ireland, the judicial system. You have all at one point or another said that that is a legitimate inquiry. I hope that the Chair heard that and took note of it, and that we all take note of it.

The second thing I would like to suggest is we have all said things that I am sure we cannot possibly mean. I am sure the Senator from Missouri does not mean that our judicial system, which may, in fact, in some circuits be peopled by folks of the Jewish faith, would not be able to render a judgment consistent with American law that involved the PLO. I am sure he did not mean that.

I am sure you did not mean, Mr. Hannay, that, in fact, these two cases that you are most concerned about warrant, all by themselves, a change in law. How about, for example, if, in fact, the courts had ruled to send them back, to extradite them, and the President intervened and said no, do not send them? Would you be here telling us that we should change the law as it relates to the ability of the Executive to make that judgment? Would you be doing that.

Mr. HANNAY. To my mind, it would depend to a large extent on the reasons that the President gave.

Senator BIDEN. Regardless of the reasons. The President just says no, I won't send them back. That is his right.

Mr. HANNAY. I believe that the Executive should have that discretion.

Senator BIDEN. Sure you do. And if they exercise the discretion in a way that you disagreed with, you would not be here before us suggesting to us that we should change the law with regard to the executive. I'm sure you did not mean that.

Mr. HANNAY. Well, I might be.

Senator BIDEN. Well, I would hope you would not be because, in fact, you would be undermining the entire basis of the argument you have made very cogently here.

So we are all saying things we did not mean.

Professor Rice, I could not disagree with you more and from where you come philosophically. You and I are like at opposite ends of the pole. I think your notion of the IRA is convoluted. Professor Pyle, I think yours is, too.

The PIRA are a bunch of thugs—absolute, unadulterated thugs. My grandfather Finnegan and my great-grandfather Blut, who was a State senator and accused of being a Molly Maguire, they wouldn't even roll over in their graves. They are a bunch of socialist, communist thugs. That is what they are.

I don't care whether the folks out there clap or do not clap. You all ought to take a lesson on who the Provisional IRA are and what their document says.

They want a socialist society—not just in Northern Ireland, but in all of Ireland when they take over. They are a bunch of thugs.

Now, as I said, I am not emotional about this, as you can see. [Laughter.]

Let me move on and talk about the facts.

Mr. RICE. Senator, may I—

Senator BIDEN. I will not yield, Professor.

Mr. RICE. OK. All right. It's just that you are completely missing the point that I made, that opposition to treaty does not imply support for the IRA.

Senator BIDEN. I think you have made it hard for me to make my case today, quite frankly, in some of your statements.

The fact of the matter is here we are, dealing with a treaty that by everyone's judgment requires us to say "make the threshold decision," that we are, in effect, going to make an exception to the way in which we deal with extradition for Her Majesty's, the Queen's, Great Britain. That is what we are having to make a judgment about here today.

My friend, Tom Eagleton—and I know we always say that up here, but he really is my friend—Tom Eagleton, because he is outraged and angered, and his righteous indignation is, in fact, warranted in the cases he cites, makes it a case of us choosing between the Provisional IRA, thugs that they are, and Mrs. Thatcher, who is not the most enlightened leader in the world, I might add.

Now, having said that, it seems to me now we get down to making the judgment about how do we handled this particular notion of defining what constitutes a political offense. What we, in effect, are doing with this treaty, it seems to me, is we are circumscribing that definition to such a degree that, as it relates to Great Britain, there will be no—no—act of violence that could fall within the definition of a political offense.

Now, once we do that—which I think is a serious mistake on the merits—how do we then make the same judgment when, in fact, the French want a treaty because there are two Basques here, and then how do we do that when the Greeks, with whom we are having enough problems come along and make the same argument because of several Albanians that are hiding out here?

On what do we make the judgment? Do we then sit here and say well, no, Greece, your system isn't as good as Margaret Thatcher's system, the British system.

Why that helps us a bunch. That helps us a bunch in an already strained world, in strained relationships.

So, although we are going at great lengths around here to make these cases, we can all make outrageous cases, we can all come up with examples, incredible examples. The ones the Senator from Missouri cited here today are examples that, in fact, generate, hopefully, the righteous indignation of almost all Americans. Hopefully they do.

I can cite for you, if we have time, some of the absolute atrocities that Her Majesty's Government has perpetrated upon Ireland and Northern Ireland—and as recently as last week. And I can argue that that gives me justification for saying they are a brutish, brutal people with a system—all of which would not be true.

But I can give you those examples.

For the record, I will submit a bunch of them.

Senator BIDEN. But again, it seems to me to miss the point. We are back to hard cases making bad law for us.

Now, if we are going to make the judgment of redefining what constitutes a political offense, we had better darn well do it not merely in the context of our relationship with Great Britain, but we had better do it in the context of the nature of world terrorism, and understand what we are about to get ourselves into, and what will, in fact, be visited upon us.

You know, we all react this way because whenever there is something that we cannot quite understand how to deal with and it frightens us—whether it is communism in the 1950's under Joe McCarthy, or terrorism in the 1980's under the present situation that exists worldwide—we all have a tendency to jump in and make serious mistakes.

These well-intended people who show up here every day, most of them I think are probably wrong on the merits of where they come from. So I want to make it clear to my colleagues and whichever colleague suggested that we respond to our political, our—what was the phrase—those interest groups that are culturally based in this country—to the extent that any of them like me, the Irish Times will write about what a chump I am tomorrow. So I hope I let a little blood for you to demonstrate that because I don't care what they think about me.

But hopefully we can focus this.

Now let me ask a couple of specific questions.

No. 1, is there any circumstances, as any of you read this treaty, starting from right to left—excuse me, from my right to my left—that would provide for the application of the political offense exception where there was violence involved? Is there any circumstance under this supplemental treaty where there could be violence involved and, in fact, a judge rule that a political offense exception was applicable here and not extradite? Would you start, professor?

Mr. LUBET. Yes; and actually I'm probably not on your right, Senator. I mean politically. But I will answer the question.

Senator BIDEN. Oh, you may be.

Mr. LUBET. I will attempt to answer the question.

Other than unarmed violence, the answer is no—that is, unarmed violence could still fall within the political offense exception under this treaty.

Senator BIDEN. What constitutes unarmed? A firearm?

Mr. LUBET. Unarmed—no use of weapons.

Senator BIDEN. Any weapon?

Mr. LUBET. That's right.

Senator BIDEN. A rope with knots in it, a knife, a sharpened spoon?

Mr. LUBET. Well, the operative language is probably an offense that involves maliciously wounding or inflicting grievous bodily harm—that could not be political. Political offenses, I imagine, would still include the sorts of things that civil rights demonstrators were involved in here in the 1960's, things that I was involved in in those sorts of demonstrations, and so on.

Senator BIDEN. But a cop breaking down your door in the middle of the night and you picking up a rolling pin and bludgeoning that cop as he comes through the door—that could not be a political offense, could it?

Mr. LUBET. Bludgeoning the police officer with a rolling pin could not be a political offense.

Senator BIDEN. Usually, as you know, in those circumstances, people are not able to calibrate their response, I mean, in self-defense. You are aware of that, aren't you?

Mr. LUBET. Yes, sir.

Mr. HANNAY. Senator, I don't believe that that example would fall within the political offense exception as it stands right now under any of the decided court cases.

Senator BIDEN. You don't?

Mr. HANNAY. No.

Senator BIDEN. Self-defense would not fall within it now?

Mr. HANNAY. That is a different issue. Self-defense is a defense on the merits and would not be grounds for denying extradition. It is a defense that could only be raised at the trial.

Senator BIDEN. But if the self-defense involved the use of violence—

Mr. HANNAY. That's a different issue.

Senator BIDEN [continuing]. With a weapon—

Mr. HANNAY. That's a different issue than the political offense.

Senator BIDEN. How? Explain that to me. I'm slow.

Mr. HANNAY. First of all, under your hypothetical, you would not have committed this crime with the intent of a political motivation.

Senator BIDEN. Like hell you are not.

Mr. HANNAY. A cop breaks in and you hit him and you say it is self-defense?

Senator BIDEN. A cop breaks in, as the circumstance would occur in Northern Ireland, assuming that you are a member of a group or individuals who are sympathetic to throwing or seeking England's departing forever from the Emerald Isle, north and south, and you pick up a rolling pin and smack him in the head, that would not be a political offense?

Mr. HANNAY. Well, as we say in law school, you changed the hypothetical.

Senator BIDEN. But isn't that the circumstance?

Mr. HANNAY. OK, I will accept that.

Senator BIDEN. The police don't knock down doors in Northern Ireland because they don't think the people whose doors they are

knocking down are involved in an effort that is inconsistent with their continued occupation of Northern Ireland.

Mr. HANNAY. OK. Let's assume the hypothetical you have given. This treaty would exclude that from the political offense exception.

Senator BIDEN. Right. OK.

So, self-defense would be, in effect, if any physical force were used, excluded from the political offense.

Mr. HANNAY. No. No. Self-defense, as a substantive defense to the substantive crime of assault, is unaffected by the existence of the political offense exception.

Senator BIDEN. Let me back up.

Self-defense against a British officer, who was, in fact, inflicting or intending to inflict bodily harm upon the person who is being sought to be extradited.

Mr. HANNAY. If it is a defense to the crime, it is still a defense to the crime now.

Senator BIDEN. Does it no longer exist as a defense if, in fact, a weapon is used?

Mr. HANNAY. No. It has no effect on that whatsoever.

I don't mean to be technical, but——

Senator BIDEN. No, be technical. That's what this is about.

Mr. HANNAY [continuing]. "Self-defense"—in quotes—is an example of authorized use of violence, and that is a defense, an affirmative defense to a substantive crime.

Senator BIDEN. Good. We are on track, now.

Now, in a court of law, under this circumstance, if, in fact, an individual seeking to be extradited from the shores of the United States used anything from an automatic weapon to a rolling pin to kill, maim, or mutilate British officers or officers of the local police establishment and did so and said I did it in self-defense, then the sitting judge under this supplemental treaty would be able to make a subjective judgment as to whether or not it constituted self-defense, notwithstanding the fact he killed or maimed with automatic weapons or a rolling pin the people who, in fact, were hurt, and they happened to be officers.

Mr. HANNAY. I'm sorry. You said a sitting judge. Are you referring to an extradition judge?

Senator BIDEN. An extradition judge, excuse me.

Mr. HANNAY. I don't believe that the judge would reach that issue.

Senator BIDEN. Why?

Mr. HANNAY. Because that issue goes to the substantive offense and not the political offense exception.

Maybe we are misunderstanding each other, but whether or not it was justified to defend yourself is an issue that is raised before the trial court, not at the extradition level.

Now, the question that you really need to be phrasing is could that be characterized as a political offense, assuming there is an uprising, assuming that this crime was incidental to the uprising and was therefore politically motivated.

Senator BIDEN. That's a valid point. Answer the first question, though, and let's forget the political offense part.

Mr. HANNAY. Is it self-defense?

Senator BIDEN. Yes.

Mr. HANNAY. Could it be self-defense? Sure.

Senator BIDEN. Could a judge make that judgment, that it is self-defense, and therefore not extradite?

Mr. HANNAY. No. Not now, not ever. That is not the thing that an extradition judge determines. He never determines the substantive crime.

Senator BIDEN. Right.

Now, to move beyond that, if, in fact, the defendant argued that it fit within the political offense category because, in fact, the reason he or she was being pursued was because they were a party to and/or sympathetic to and/or had some relationship with those who supported an uprising, and in that context someone was killed, an officer was killed, would, in fact, the political offense argument be negated—not able to be raised—as a consequence of the fact that there was a firearm or a rolling pin used to kill somebody?

Mr. HANNAY. I understand the question. Given that fact situation, under current American law——

Senator BIDEN. No, under this treaty. Under the treaty.

Mr. HANNAY. Under the treaty, no, that would not be an excuse that would take you out of the political—I'm sorry, I'm getting my exclusions and exemptions confused.

Senator BIDEN. Take your time. I'm having trouble, too.

Mr. HANNAY. The political offense exception would still not apply.

Senator BIDEN. That's correct. OK.

So, there are circumstances under which someone in Northern Ireland could, in fact, but for the fact that they have then associated in the broadest way with those who oppose British occupation, they could in fact, under the laws that exist, the emergency powers that exist, within Northern Ireland—and I will dig them out and cite them for you—which allow things like people to knock doors down and the rest, which we would not allow here in this country, if that person resorted to what most of us would consider self-defense, in that circumstance, they could not raise the circumstance under which they used violence in a political context as justification for being granted the political exception in the treaty.

Mr. LUBET. That's absolutely correct.

Mr. HANNAY. That's absolutely right.

Now, let me just remind you that that does not prevent in any way their raising that defense, as you call it, a self-defense defense——

Senator BIDEN. Back in Northern Ireland.

Mr. HANNAY [continuing]. In the course of a trial.

Senator BIDEN. I understand that.

Is there any circumstance, professor, that you are aware of where the use of violence could fall within the category of qualifying for the political offense doctrine under the proposed treaty?

Mr. PYLE. Yes.

Senator BIDEN. Would you cite it for me, please.

Mr. PYLE. Violence that does not inflict grievous bodily harm.

Senator BIDEN. And what constitutes grievous bodily harm, by and large? Obviously there is a body of law in both nations that defines that. But give us, for the record, the type of things that would encompass.

Mr. PYLE. I would presume drawing blood, breaking bones, rending flesh.

Senator BIDEN. OK.

Professor Rice, you have wanted to speak for some time now, so why don't you answer the question for me.

Mr. RICE. I think it would go further than that. It refers to maliciously wounding or inflicting grievous bodily harm, and it does not say how much you have to wound the person.

I think the testimony by Judge Sofaer is quite clear. He said that this would reduce the political offense exception to pure political offenses and nonviolent ones. Incidentally, I think it is sheer fantasy, Disneyland, to say that it is a protection of the defendant to say that he can raise that self-defense objection when he gets back to Northern Ireland.

I think it is clear that all violent activity would be excluded from the political offense exception.

Senator BIDEN. Let me ask you all the following question, and I promise you I will not keep you any longer.

Mr. Chairman, are we going to go on through with the next panel? What is our schedule?

Senator TRIBLE. Well, what I would propose is that we recess and come back at 2 or 2:30 p.m., if that would be agreeable.

Senator BIDEN. That's fine by me.

Mr. RICE. If you don't mind, Mr. Chairman, there is a plane I have to catch.

Senator BIDEN. I will try to end my questions for this panel in the next five minutes so there will be no need to inconvenience anyone.

And I will, with your permission, Mr. Chairman, submit some questions for the record. They will not be extensive. I would hope the witnesses could respond to them in writing.

Last, I will be submitting for the record at some point some clarifications of the fact circumstances under which some of these cases were raised, because it does not warrant getting into now, but it is nice to have in the record—for example, what an enlightened Judge Lord Justice William Gibson is and a few others who are mentioned here.

Let me go back to the one last point I would like to make, and you can all go and get lunch.

It is this. I would like, if you would, professor, to suggest that you and I think it was Senator Kerry got into a discussion about what is categorized as a criminal act in this country and in the country to which the defendant is being extradited.

I got distracted and I lost my train of thought and your explanation of how conspiracy, possession—what was it?

Mr. LUBET. Actually it was possession of a firearm with intent to commit bodily harm. That was the paradigm that we were using.

Senator BIDEN. Right.

Now, my recollection is you acknowledged that was not a crime in the United States and is a crime in Northern Ireland, but that somehow—

Mr. LUBET. Shall I just repeat that for you?

Senator BIDEN. Yes, if you would, because I was not sure what you were saying.

Mr. LUBET. Yes, sir.

What we have are two parallel aspects of the extradition treaty that sound alike, but are not. So, in the main section, we have a scheduled list of crime that are going to be extraditable. It has nothing to do with politics. It's just that these are the crimes for which there will be extradition, and one of the requirements is the standard requirement that the offense must be a crime in both jurisdictions. It has to be a crime here and it has to be a crime there.

Senator BIDEN. That is the threshold standard that has to be met?

Mr. LUBET. That's right.

That is really the definitional section for extraditable offenses.

Now, we move over to the supplement. Here we have a list of descriptions of acts that can comprise crimes, but not really definitions of crimes. The schedule in the supplement does not define, in my view, extraditable offenses, but really gives a gloss to the political treatment of the extraditable offenses as defined in the main treaty. So it would not be sufficient to charge someone with possession of a firearm with intent to commit bodily injury if that is not a crime in the United States.

I have not done a 50 State survey, so I don't know the answer to that question. But assume that it is not a crime. Then you could not charge someone with the offense of possession of a firearm with intent to commit bodily injury and call that an extraditable crime.

What you could do, what the British could do, is to charge someone with possession, unlawful possession, of a firearm, which is a crime in the United States, at least in Illinois, and there are all sorts of Federal crimes for possession of a firearm. So you could charge someone with possession of a firearm assuming that it meets the felony requirement and all the other requirements, and that would be an extraditable offense.

Then you would go and look for the political offense treatment, and you have to answer the question about possession with intent to commit serious bodily injury—not to answer the issue of whether it is extraditable, but to answer the issue of—

Senator BIDEN. You hear that noise? I sure would like to know who the hell is trying to drill his way in here, to break in here. One of us may be in trouble. [Laughter.]

Mr. LUBET. You know, I have been looking at my watch, and there is not much relationship between that buzzer and the time. [Laughter.]

So, you would look to that second schedule to decide whether it falls within or outside the political offense exception.

Senator BIDEN. In terms of legislative draftsmanship, would it be cleaner and neater, assuming that such an offense does not exist within the United States, notwithstanding that it is in, in effect, the appendix, would it not make sense to eliminate it?

Mr. LUBET. No, I don't think so.

Senator BIDEN. Doesn't it create confusion?

Mr. HANNAY. May I jump in and help?

Mr. LUBET. Well, I don't know if you can help, but you can jump in.

Mr. HANNAY. Well, I was hoping you would say yes, I could help. But let me jump in.

The list that is in articles I(e) through (l) define certain kinds of offenses, the only kinds that could be extradited. Some of these have an intent element. The reason that the list is there is to make clear that only the most serious kinds of possessory offenses are extraditable.

The question was asked by Senator Kerry, are there statutes in the United States that have an intent element, possession with intent to use.

Senator BIDEN. Well, there are.

Mr. HANNAY. Plainly we have them. There are plenty of those.

Senator BIDEN. Sure there are.

Mr. HANNAY. And we deal with intent crimes all the time.

The point that Professor Lubet is making is that these do not contain the statutory definition of the crime. This simply brings within the extradition treaty certain kinds of crimes. And we still have a role for the judge here. The judge is the one who has to take the statute that a person is being extradited for, compare it to the list here, and see if they match.

He also has to compare it to the United States offenses to see if there is the dual criminality issue.

This list in the treaty does not define what a person will be indicted for.

Senator BIDEN. I clearly understand that.

All I am saying is it seems to me that, at best, it adds very little, and at most, it allows for mischief.

Mr. HANNAY. No, I disagree. It adds something very important. You cannot extradite somebody for a crime that is not on this list.

Senator BIDEN. I understand. That particular offense—

Mr. HANNAY. Don't you think that possession of a firearm with intent to use is a serious enough offense to include? I do.

Senator BIDEN. Oh, no, I don't. I think it allows for incredible mischief.

Mr. HANNAY. All right. Then we simply disagree.

Senator BIDEN. That's all I am saying. I think it allows for incredible mischief. That is why we do not have it on the books here.

If I could look into the minds of men and women and could do so in an omniscient way, there are a lot of things I would make an offense on the books, and we would all agree on them. Anyone out in that audience who intends to do me bodily harm as I walk out the door here, if I could somehow look into their mind, I sure as hell think they should be arrested if we knew for sure. The problem is we are incredibly fallible. That is No. 1.

No. 2, when we talk about intent in those kinds of circumstances, what we do is we allow for a lot of mischief to be made on an island, by the way, where mischief has been the practice, rather than the exception, for 800 years.

Mr. LUBET. Senator, I see this provision almost conversely from the way you do. I see it as a narrowing provision, not as a broadening provision. That is, they could have drafted a treaty that said unlawful possession of a firearm could never be considered a political offense. That is what I read this as qualifying.

So, rather than having that big, broad exception to the exception, for unlawful possession of a firearm, it is narrowed. Unlawful possession of a firearm could be a political offense under this treaty,

but not if it is possessed with the intention to cause serious bodily injury to another.

So I see that really as protective of the individual, and not as expansive.

Senator BIDEN. I think that is a valid point. I can understand how you could see that and I understand how it could be read that way.

I have many more questions.

Mr. HANNAY. May I just add one other thing?

Senator BIDEN. Sure.

Mr. HANNAY. Often you will see in an indictment numerous offenses that are charged. Often in a murder case, in addition to the charge of murder, you might have kidnaping, and you might also have a possessory weapons offense, perhaps with the intent to use. Under extradition law, when you have a list of the offenses for which you can be extradited, those are the only ones you can be tried for. We cannot return somebody for a murder charge and have him also then get charged with robbery or something else that is not named within the list of offenses here.

I note, for example, that robbery is not one of the crimes enumerated in this treaty.

Senator BIDEN. So, under this section, under this treaty, no one could be taken back to Northern Ireland and tried for possession of a firearm with intent to do bodily harm. Is that your reading?

Mr. HANNAY. No. I was just giving a little background.

Senator BIDEN. Well, now, I want to make sure I understand this.

Mr. HANNAY. A person could be charged with that as the only offense.

Senator BIDEN. But if he were charged with that as the only offense, then we would not extradite him because it would not pass the threshold question of being a crime in both countries.

Mr. LUBET. Assuming that it is not—and we do not know the answer.

Senator BIDEN. Yes, that is what I am saying—assuming that it is not.

Mr. LUBET. Assuming that it is not a crime in both countries.

Senator BIDEN. That is the assumption we should go for.

So, in fact, if it were the only crime named, the judge would just dismiss.

Mr. LUBET. Sure. It would be no problem. It would not fall within the treaty.

Senator BIDEN. It would not fall within the treaty.

Now, assuming that there is a crime, that is, possession of a firearm or murder, the allegation is murder, OK, and we extradite. Once they are back in Northern Ireland, they can not, under our understanding of the treaty, be tried for the offense, the Irish offense, the Northern Ireland or British offense of possession a firearm with the intent to do bodily harm.

Is that correct?

Mr. HANNAY. Correct.

Senator BIDEN. Now, what would we do if, in fact, they did try such a person for that?

Mr. LUBET. We would declare them in breach of the treaty.

Senator BIDEN. OK. That's what I wanted to know.

Thank you very much.

Mr. RICE. Senator, could I add just one thing on that.

Senator BIDEN. Sure, Professor Rice.

Mr. RICE. I think we have to remember the burden of proof question. Under section 9 of the EPA over there, on a possession offense, all they have to show is that he and the article were both present in the premises, and then the burden shifts to him.

Senator BIDEN. What I am not taking the time to do here, and I don't want to mislead any of you on this—but I will take the time to do at the process that I hope we are going to follow, that is, the suggestion that we have a hearing on the nature and state of the courts and laws of Northern Ireland. The reason I am not doing that now and doing it extensively is, because, in fact, we are going to have, I hope, such a set of hearings, where, in fact, that becomes relevant.

I was trying to keep this on a different point. It is not to suggest that it is not relevant, but it is to suggest that, from my perspective, the place it should be examined is in the context of answering—and I like the way Mr. Hannay described it, as a tree—the thresholds. There are certain plateaus or thresholds we have to pass, and one of them relates, at some point, depending on where you put it on the tree, to the nature of the system with which we are moving forward to enshrine in a treaty a bilateral relationship.

Thank you, Mr. Chairman.

Thank you, gentlemen.

Senator TRIBLE. All right.

Ladies and gentlemen, we will recess until 3 o'clock. At that time, we will hear the last panel.

Senator Eagleton has asked that Professor Rice and Professor Pyle return. I would ask you to return. I cannot command your appearance at 3 o'clock. But Senator Eagleton has some more questions to ask.

If it is not possible—and, Professor Rice, I think I heard you say that you had a plane to catch.

Mr. RICE. I have a 3:20 flight and I have to get back.

Senator TRIBLE. Then, given Senator Eagleton's wish for questions—

Mr. RICE. I'd be happy to answer questions in writing.

Senator TRIBLE [continuing]. And since it is most unlikely that you could be here at 3 and make your 3:20 flight, any further questions that he would have he could submit in writing.

Mr. RICE. I would be glad to answer anything.

Senator TRIBLE. Professor Pyle, would it be possible for you to return at 3 o'clock?

Mr. PYLE. Yes, it would be.

Senator TRIBLE. Then I would ask you to do so. Thank you.

Let me say that we have sat through 3-days of hearings, and I think this panel has been by far the most informative and constructive element of that 3-day process. I thank you gentlemen for your presence.

Senator BIDEN. Before we adjourn, I would like to ask your permission, Mr. Chairman, to enter into the record at the request of Chairman Rodino a statement on this issue, on this treaty.

Senator TRIBLE. The record will be so expanded.

We will look forward to reading his statement as well.

Gentlemen, I would only ask Professor Pyle, then, to return, if he could, at 3 p.m.

The rest of you, I thank you for your presence and for your statements.

[Whereupon, at 1:20 p.m., the committee recessed, to reconvene at 3 p.m., the same day.]

AFTERNOON SESSION

The committee met at 3 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Paul S. Trible, Jr., presiding.

Present: Senators Trible, Eagleton, and Kerry.

Senator TRIBLE. The hearing will come to order.

At this time, Professor Pyle, you are welcome again, and my colleague, Senator Eagleton, has a question or two to ask.

Senator EAGLETON. I just have one question for Professor Pyle, Mr. Chairman, thank you.

Then I would like to make a very brief statement and then depart this midst.

Professor Pyle, assume that Dr. Mengele had lived and not died in Brazil, but was living and apprehended in Brazil, and assume Israel sought extradition of Dr. Mengele from Brazil to Israel, for trial in Israel.

Mr. Eichmann was tried in Israel, but he was apprehended and brought to Israel for trial. But assume Mengele had been found and was held in a Brazilian jail.

How would you evaluate that case from an extradition point of view in terms of due process, et cetera, that Mengele would receive in an Israeli court?

STATEMENT OF CHRISTOPHER H. PYLE, MOUNT HOLYOKE COLLEGE, DEPARTMENT OF POLITICS

Mr. PYLE. I would have great difficulty extraditing him.

Senator EAGLETON. You would have great difficulty extraditing him?

Mr. PYLE. If I used the rule of inquiry——

Senator EAGLETON. I'm sorry?

Mr. PYLE. If I used the rule of inquiry, I'd have great difficulty turning over a tormentor to his victims for punishment, and the passions in that situation may be so high as to make me doubt the capacity of the requesting regime to do justice.

That is the most painful hypothetical you have given me so far, because everything in my being says I want that man punished.

I also have another problem with a *Mengele*-type case, which is posed by a comparable case now going on, the *Artukovic* case, where the evidence is 40 years old. The witnesses are dead, in many cases exterminated by Nazis or by people allied with Artukovic's government; also exterminated by the Communists who came in afterward and mopped up.

So it is very hard to do justice in those circumstances.

My entire position here has been based upon the principle that our courts should not act unless they can do justice. So you have

given me the hardest and most painful case, and I have answered it in a way that does not make me happy.

Senator EAGLETON. You have been very candid and very forthright.

What would Brazil do with Mengele if the examining magistrate decided, as you indicate you might decide, that he was not extraditable? Would they turn him loose?

Mr. PYLE. I would think that, under certain theories of international jurisdiction, because it was a crime against humanity, they could prosecute. But I would have the same problem with prosecuting a man 40 years after the event.

That is why we have statutes of limitation, although we often do not have them for capital crimes. We say we should not have them for war crimes. I think we should.

I will give you the example for that, and that is the *Artukovic* case. A lot of charges have been made against Dr. Artukovic. I don't know whether they are true or not. But I have read the legal papers, and I have read the judges' opinions from the 1950's. I have read the book by Ryan about the case, and I don't see that they have the evidence.

It's not that the evidence may not have existed. The circumstantial evidence, given Artukovic's position as Minister of the Interior, suggests that a lot of the charges may be credible. But because of intervening deaths, they don't have the evidence. Some of the evidence they have does not work. There are mistakes in it. Accusations are being connected with a military unit that did not come into existence for another 6 months.

This is because people's memories, over time, are not accurate. I'm afraid with many of the World War II war crimes, we're just stuck.

Senator EAGLETON. I'm sorry. I didn't hear you.

Mr. PYLE. We're stuck. There is not much we can do, except work to make sure it never happens again.

Senator EAGLETON. Could the United States try Mr. Quinn for crimes against humanity? We have no memory problem now. It is very current.

Mr. PYLE. I would not want to take the crimes against humanity concept and demean it in that manner. I want to save that definition. But, as I told you before, I have no difficulty extraditing Mr. Quinn to the criminal courts of London on the charges of being part of a group that planted letter bombs and bombs in railroad stations and pubs. I have no difficulty there.

Senator EAGLETON. In your studies of extradition and your special focus, as you have the right to do in your studies, on Northern Ireland, the PIRA and matters related to them, have you made any comparative evaluation between the conduct of the PIRA and its ancillary use of terrorism as part of its political and military technique vis-a-vis the activities of the PLO and its ancillary use of terrorism as part of its political and military technique?

Mr. PYLE. I have not done a systematic study. I must say that I have had difficulty finding good, reliable evidence about various allegations against the PIRA.

Senator EAGLETON. Well, you have the *Quinn* case. That's a pretty good one for openers.

You also have the *County Down* case that I have cited.

Mr. PYLE. Yes, and numerous kneecappings and a whole lot of other things, bombings, et cetera. I've been to Belfast. I've seen the buildings that were bombed out. But if you are asking me whether I have gone back and checked each allegation out to make certain that it was the PIRA and not the Ulster Defense Association, or that the allegations were not exaggerated, I have not been able to do that.

And I have tried. I have gone to Belfast for this purpose. I have even asked the Royal Ulster Constabulary if they would supply me with their evidence, but they refused.

I have read all the books that I can find on Northern Ireland. I have tried to gather this information, but in gathering the information from all sides of the dispute on the assumption that all sides have exaggerations and all sides have truth.

Senator EAGLETON. But do you remember the *County Down* case in 1978?

Mr. PYLE. No, I don't remember that case, but I remember cases like it. I remember one in Belfast like it was later alleged, and maybe proven, that the bombing was really committed by the Ulster Defense Association and not the PIRA.

Senator EAGLETON. That bombed a restaurant frequented by Protestants? As a decoy?

Mr. PYLE. I don't know.

Senator EAGLETON. Do you think Lord Mountbatten was blown up as a decoy?

Mr. PYLE. No, I don't.

Senator EAGLETON. Do you think the attack at Brighton on the British Government was a decoy.

Mr. PYLE. No, I don't.

Senator EAGLETON. The attack at Harrod's Department Store?

Mr. PYLE. No, nor the bombing of the band concert nor the——

Senator EAGLETON. Or the bombing of the Horse Guards, et cetera, outside Buckingham Palace?

Mr. PYLE. Nor the Horse Guards. The PIRA came out and said that that was an unauthorized PIRA action.

Senator EAGLETON. Now, compare those activities of the PIRA with identifiable activities of the PLO in blowing up synagogues in Paris, and blowing up Jewish restaurants in London, et cetera. Is there a similarity?

Mr. PYLE. Those particular examples are very comparable. If you were to take airplane hijacking, however, I don't recall any instance where the PIRA has ever hijacked an aircraft.

Senator EAGLETON. No. We have stated that they have not gotten into that yet.

Mr. PYLE. I have not found a case where they have taken a hostage in the sense of taking a hostage for trade.

Senator EAGLETON. There have been two kidnappings and we will put them in the record.

[The information referred to follows:]

PIRA KIDNAPING INCIDENTS

(1) On October 3, 1975, a group of PIRA members kidnapped a Dutch industrialist, Dr. Tiede Herrema, demanding the release of three PIRA prisoners held in the Re-

public. The PIRA released Dr. Herrema on November 7 after they had been surrounded by the police to whom they surrendered. Their demands for the release of PIRA prisoners were unsuccessful.

(2) On December 2, 1983, a supermarket executive, Don Tidey, was kidnapped by the PIRA and held for five million pounds ransom. On December 16, 1983, Mr. Tidey was rescued; no ransom was paid. One policeman and one soldier were killed during the rescue.

Mr. PYLE. Were they PIRA or were they INLA kidnappings?

Senator EAGLETON. We will get the sheet and will see.

But in terms of bombings—let's for the moment stick with bombings—

Mr. PYLE. Belfast is a monument to PIRA bombings.

Senator EAGLETON. The PIRA, that is their real specialty, isn't it?

Mr. PYLE. Yes—bombs made with fertilizer.

Senator EAGLETON. And the PLO, although they do some hijacking, as we all know, bombing is really their specialty, too, isn't it?

Mr. PYLE. Yes.

Senator EAGLETON. So, to that extent, in terms of murderous bombers, the PIRA and PLO sort of fit.

Mr. PYLE. Well, if you take any set of complex facts and select a few, you can find some good fits, yes.

Senator EAGLETON. Mr. Chairman, at this time, I'd like to put into the record two summaries of overseas terrorist activities, one dated June 1982, one dated July 1983, which deal with bombings around the world in such places as Zurich, Rome, Vienna, Copenhagen, Athens, Paris, Paris, Munich, Paris, Paris, Paris, Paris, Tokyo, Madrid, and many, many other cities around the world. This was prepared by the Israeli Embassy; it describes the attack; it describes the perpetrator, if known, if the perpetrator is unknown, it so lists. In many instances it lists unknown. It has an unknown bombing, for instance, of a Jewish synagogue somewhere.

I would ask that those two documents be put into the record at this point.

Senator TRIBLE. Without objection, it is so ordered.

Senator EAGLETON. Let me say that Professor Pyle handed me a note, and I am grateful that he did, with respect to the European Convention. There was a question of what countries had adopted the convention with respect to the categorical crimes in article I; that is, what countries take article I in its entirety, and what countries in Europe take article I with some exceptions. There are 11 countries that have made exceptions—correct?

Mr. PYLE. Eleven countries have accepted the categorical exception list, and nine countries have made exceptions.

Senator EAGLETON. Oh, 11 have accepted as a total package.

Mr. PYLE. That's right. So the majority have accepted.

Senator EAGLETON. OK.

The majority have accepted, and they are: Austria, Belgium, Germany, Greece, Liechtenstein, Luxembourg, Malta, Portugal, Spain, Turkey, and the United Kingdom. Those are the ones who have taken it in toto.

The ones who have made exceptions are Cyprus, Denmark, France—you have a question mark there.

Mr. PYLE. Yes, I'm not sure. It's a very rhetorical statement, and I'm not sure just what it means.

Senator EAGLETON. All right, we will leave France as an "iffy" thing.

Mr. PYLE. That's why I put a question mark on it.

Senator EAGLETON. OK, France, question mark. Also, Iceland, Italy, Netherlands, Norway, Sweden, Switzerland—do we have the Netherlands twice?

Mr. PYLE. If so, I'm sorry.

The Republic of Ireland chose not to sign the treaty at all.

Senator EAGLETON. The Republic of Ireland has not signed the treaty at all, then.

Mr. PYLE. Yes.

Senator EAGLETON. Thank you.

That is all I have for Professor Pyle.

Mr. PYLE. Thank you.

Senator TRIBLE. There will be no further questions for Professor Pyle. Thank you.

Mr. PYLE. Thank you.

Senator EAGLETON. May I have 3 minutes before I leave, Mr. Chairman.

Senator TRIBLE. Yes, you certainly may.

But first, Professor Pyle, we thank you very much for your time and for your input.

Mr. PYLE. Thank you very much.

Senator EAGLETON. As I left today, about 1 o'clock or so, Senator Biden made a very interesting statement and I subscribe to much of what he said in his statement.

He indicated, though, that I had interjected the politics of the treaty into this hearing. I did not do so. It was our colleague, Senator Dodd, who asked one of the professors as to what would be the politics of the situation if the treaty were ratified, and would that not be a victory for Mrs. Thatcher? The professor, properly so, but in a subdued voice, said: "Well, politics, you fellows know more about that than I do, but I guess it could be so considered; but if the treaty were rejected," and then I said in a loud, audible voice: "Yes, if the treaty were rejected, it would then be considered as a victory for the PIRA." Senator Dodd is the one who raised the political consequences of the treaty.

I agree with Senator Biden, that the political consequences of the treaty are irrelevant, but it was Senator Dodd who interjected it into the hearing. And it is his free right to do so. We are politicians.

Now, I am about to leave, Mr. Chairman, and I would like to give a brief summary of where I think this treaty is, and then I will give a summary of where I think I am on it.

The treaty is in trouble. That is self-evident. The treaty, as written, is in trouble.

My preference would be, if I lived in a world of free preferences, that we go the legislative route. In fact, I think we should inform the legislative committees of both the House and the Senate that we may hold in abeyance for a reasonable period of time this treaty to give them a chance to act. I don't think we should hold it in perpetual abeyance. I don't think we should hold it for yet another term of Congress.

If the House is sincere about acting—and we had Congressman Hughes here before us the other day and he said he is really sincere about acting, and Chairman Rodino is sincere about acting, and Senator Biden is the ranking Democrat on the Senate Judiciary Committee and he is sincere about acting—so let them act. Let them pass generic legislation dealing with this.

To me that would be a preferable route.

However, if they do not act, then we must do something with this treaty.

I think we should amend it, or, to use the more technical term, “promulgate” some reservations to it, and as a general concept—I am not wedded to precise phraseology or wording—here is where I, generally speaking, think it might or could end up.

I would start with the European Convention. That is now recognized by civilized nations as the basic document as to how to deal with this vexing issue. I would start with it as a beginner, and I would emphasize that it would take care of hijacking, it would take care of kidnapping, and it would take care of bombs.

I can find no legitimate justification for any kind of political exemption for a bomber. I don’t think political activists have the right to bomb. I know of nothing in the American Constitution or the order of civilized nations that gives one the inherent right to bomb.

I would also add murder, as Congressman Biaggi suggested in his testimony. Murder could well be added to it.

Then I would also add some catchall words that have now been recognized by all the professors and by the whole legal community. I would add a section, a general section, dealing with wanton crimes, crimes of special cruelty, and crimes of odious barbarity. And we would see what else, if anything, might be added.

I am not saying that this is my outer limit. I am not saying that this is my base price. I’m saying that is how I think I might go about this.

I am not in concrete on it. But somewhere along the line, I think we may have to reach the point where some reservations are drafted.

Finally, I think it is imperative, Mr. Chairman, that we have the State Department back as witnesses. I know that you have been very patient in these hearings and have brought in extra witnesses and have allocated a lot of your time. But I think, in light of the intervening testimony, there are some questions that ought to be asked of the State Department about this treaty. I don’t think it would be a long hearing, a multiday thing. I think it could be done in a morning, with dispatch. But I think somewhere along the line the State Department ought to come back.

And I think we ought to explore this with the legislative committees, if they are sincere about acting. It is one thing to say “oh, we are getting ready to go, we are going to crank up legislation,” but then have nothing happen. If they are sincere about moving and if it is a primary order of business over there in the House and if it is a primary order of business here in the Senate, to me that is one thing. But if it is just footdragging, and we say “oh, we will put it off again for another Congress,” and another Congress, and another Congress, then I think we have to go the treaty route. And I

think we have to help with respect to these bombers, and these terrorists, and these hijackers, and these killers.

I think we would want help and do want help in the PLO context with people who have killed American citizens, one of whom was buried just yesterday. We want the help of the world in getting that sinister no-good so-and-so so that we can try him. And we want other nations to be able to try their sinister thugs, their bombers, their murderers. We should not be shy about it.

That is just a general observation of where I think we are and where I think we maybe ought to go.

I thank you for your indulgence, Mr. Chairman, and I must now go elsewhere.

Senator TRIBLE. Senator Eagleton, I thank you for your presence, for your penetrating questions, and your thoughtful analysis.

We will recess so that Senators can respond to a rollcall vote. I will return in a matter of minutes to begin the last panel.

I would invite those panel members to take their seats at the witness table. They are Mr. Halperin, Mr. Helton, Mr. Carliner, Professor O'Dempsey, and Judge Maier.

Congressman Gilman, I would love to hear you now, but I have to go to vote.

Would you please come forward, and I will be back as quickly as my young legs can carry me to the floor and back.

We will recess.

[A brief recess was taken.]

Senator TRIBLE. The hearing will come to order.

Congressman Gilman.

STATEMENT OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM NEW YORK

Representative GILMAN. Thank you, Mr. Chairman.

Mr. Chairman and committee members, I welcome your allowing me to appear with a distinguished panel which I am to introduce today, and to express briefly my concerns about this extremely important issue, the Supplemental Extradition Treaty that has been recently negotiated—

Senator TRIBLE. Ben, why don't you pull the microphone a bit closer so that all can hear you.

Representative GILMAN [continuing]. The Supplemental Extradition Treaty recently negotiated between our Nation and the United Kingdom.

As you know, Mr. Chairman, I was 1 of over 50 Members of the House who wrote Chairman Lugar last July, requesting that he conduct full and open hearings on this treaty, and I commend the committee for the time and effort that you have taken to make certain that voices on all sides of the issue have been carefully reviewed.

I will not take the valuable time of this committee reiterating the provisions of the proposed treaty. I would, however, like to associate myself with the deep concerns expressed by both my colleagues and the other experts who have testified during these hearings regarding the elimination of the political offense exception

and the imprudence of addressing international terrorism on a treaty-by-treaty basis.

The political offense exception protects against the use of American courts for the extradition of political fugitives whose crimes consist of authentic, political dissent or rebellion. While I would agree, in principle, with Judge Abraham Sofaer, when he testified before the committee on behalf of our State Department, and I quote him, that "The political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment," I do not believe that this criteria is applicable in the case of Northern Ireland.

In my capacity as a member of the House Committee on Foreign Affairs, I have, for some time now, been monitoring the tragic conflict in Northern Ireland. Lest I misrepresent my sentiments, let me state for the record that I am committed to working for and supporting efforts for a real and lasting peace in Northern Ireland.

I have visited Northern Ireland. I have been in the prison at Armagh to meet with some of the prisoners. I have toured the factories, both east and west of the Bann. I have walked the streets of Belfast and had an opportunity to confer with members of paramilitary, and nonmilitary groups, and their leaders. I know firsthand of the suffering of the Catholic minority in Northern Ireland and the day-by-day injustices and discriminatory employment practices as well as social and political harassment.

The questionable treatment of the Catholic minority in Northern Ireland before the nonjury Diplock courts and the supergrass trials have been well documented here as well. I share the reluctance of many of my colleagues to extradite individuals to such a judicial system.

Clearly, these should all be points of deep concern for the committee and warrant your careful review, vis-a-vis the elimination of the political offense exception.

As a member of the House Committee on Foreign Affairs, I have and will continue to speak out against international terrorism. If Congress, not the governments of other nations, decides that the political offense exception deserves a second look, I submit that that change should be made legislatively, and not on a treaty-by-treaty basis.

Let Congress decide what constitutes a terrorist act and institute reform legislation to apply that criteria on a uniform basis.

It is my understanding that the chairman of the House Committee on the Judiciary, Peter Rodino, has indicated his willingness to consider comprehensive extradition reform, along with Senators Thurmond and Biden of the Senate Judiciary Committee.

Accordingly, I urge the committee not to recommend ratification of this treaty and for the full Senate to heed that recommendation.

I would like to note that I will be followed by two witnesses from my own area whose knowledge of the law and involvement in Irish-American affairs affords them a unique perspective on the Supplemental Extradition Treaty.

Frank Durkin is a senior partner in O'Dwyer & Bernstein in New York City. He resides in Westchester County, a portion of

which I am proud to represent, and is a member of the Brehon Law Society of New York City.

Ms. Keara O'Dempsey is a native of Montgomery, NY. Although I no longer represent Montgomery because of the 1982 redistricting, my ties to that region remain strong, and I am pleased to have her join us today. Ms. O'Dempsey is currently a professor of law at St. Thomas University Law School in the State of Florida.

That panel will be joined by Morton Halperin of the American Civil Liberties Union, Mr. Arthur Helton of the Lawyers' Committee for International Human Rights, and Mr. David Carliner of the International Human Rights Law Group; also Judge Eugene Maier, the Court of Common Pleas, of the First Judicial District of Philadelphia, and president of the Brehon Law Society of Philadelphia.

These six distinguished witnesses will echo the concerns of many of my constituents, some of whom are present here today, but are unable to offer their testimony personally.

I look forward to hearing the testimony of these fine spokespersons.

Again, I thank you, Mr. Chairman, and the committee, for the time in consideration of this critically important issue.

Senator TRIBLE. Congressman Gilman, I thank you for your good words, for your insights, and we will now welcome the full panel.

We will proceed with the list of witnesses according to the agenda.

Mr. Halperin, we will call on you first.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. HALPERIN. Thank you, Mr. Chairman.

I ask that my full statement with an attached letter from the National Council for Civil Liberties in the United Kingdom be made a part of the record, and I will summarize.

Senator TRIBLE. It will be made a part of the record, and I would tell your colleagues at the witness table that all of their statements will be made a part of the record as well.

You are invited to hopefully summarize those statements, but if you feel compelled to read those statements, then I am here to listen.

Mr. HALPERIN. I will summarize my statement and I will try to be brief.

The recommendation of the American Civil Liberties Union, Mr. Chairman, is very simple. We believe that you should set this treaty aside and encourage the legislative committees to get on with the business of enacting new extradition law. We believe the extradition laws need to be modernized, and not only to deal with the political offense exception. There are a number of other problems with the current extradition law. It does not permit bail, for example, and there are a number of other issues that we think urgently need addressing. We would urge that that be done.

I think it is important to remind all of us that, while we tend to think of extradition as involving people who flee from one country to another and then are sent back, that, in fact, extradition can be requested for a person who has never left the country he resides in.

For example, an American citizen, born here, who has never left this country, could be the subject of an extradition request from the United Kingdom or from another country on the grounds that he had participated here in a crime in that country.

So, when we think about what the form of the extradition law ought to be, I think we need to keep in mind that it applies not simply to fugitives fleeing from a warrant, but to a whole range of people, including Americans who have never left the United States.

We would be concerned in any case, but I think that fact, which is often overlooked, requires additional concern about the issue.

Our concern is both with the fact of the treaty route and with the substantive standard that is in the treaty. Let me just touch on each of those briefly.

We believe that there should be a single standard for all countries, that the task of determining in which countries it is appropriate to revolt is the kind of task that ought to be left to historians. It is not a task for the Congress. It is not a task for the bureaucracy, and it is not a task for judges.

We should have a standard of conduct which subjects people to extradition and one which does not, and not try to go about the business of deciding for other people when it is appropriate or not appropriate to engage in revolt against the Government.

There is also the practical consideration that a number of Senators have already mentioned, which is that if you approve this treaty, the administration has already told you that it will bring other treaties before you, and the Senate and the administration will have to be engaged in the business of certifying what countries are stable democracies with effective, functioning judicial systems.

Now while it is true, as you suggested, Mr. Chairman, that this committee often has to make decisions about whether to give aid to particular countries, whether to condition aid with particular limits of one kind or other, that, I would submit, is unavoidable and difficult, but not the same thing as what countries you enshrine on a permanent list of countries for which the Senate is willing to ratify a treaty saying it is a stable democracy.

You can make up your own list of countries that are questionable. It is clear that every ally of the United States will insist upon being on that list. The Government of the Philippines, the Government of South Korea, the government of take-your-choice-of-countries will be in here. The Government of Nicaragua would have been in before the revolution in that country. One assumes the Government of Haiti would have the good grace not to, but I doubt if many others would.

We are going to have to decide, this committee is going to have to decide and the Senate is going to have to decide; and every time you decide no, you will pay a price. You will pay a price in our political relationship with that country, you will pay a price in terms of our security needs, whether they are for bases or for support in the United Nations by having turned them down.

I would suggest that that is a path which it is not in the interest of this committee or of the country to follow.

Let me turn briefly to the question of the standard.

Judge Sofaer, in his testimony, characterized the treaty as relating to terrorists who commit specified, wanton, acts of violence. Of

course, the treaty does no such thing. It deals only with certain crimes, far beyond the list of what one would call wanton crimes. And, of course, one does not have to be a terrorist at all. One only has to commit one of those crimes to not be entitled to the political offense exception.

The view of the American Civil Liberties Union is that the extradition laws do need to be modernized to take account of the problem of terrorism, and to specifically provide that terrorist acts should not give rise to a claim of the political offense exception.

We believe that can be done in legislation, which would cover what the word "terrorist" means, and, as it is generally used. This treaty, of course, goes far beyond that, to assert that every violent act, no matter how narrowly focused, for example, on military forces, no matter how proportional to the acts against them, simply is not covered by the political defense exception.

We believe that that sweeps far too wide, and it illustrates the danger of trying to change the law by treaty. We would urge, therefore, let me say again, that you set this treaty aside and that you encourage your colleagues on the Judiciary Committees to move forward with legislation, the legislative arena is the appropriate place to debate the question of how precisely to draw the line between terrorist acts which should never be subject to the political offense exception, and to other violent crimes, for which the person whose extradition is sought, should have the opportunity to demonstrate that he or she is entitled to that protection.

Thank you.

Senator TRIBLE. Mr. Halperin, how would you define terrorist acts?

Mr. HALPERIN. I think that the definition that was offered and accepted in the House Judiciary Committee is a good place to start. It talked about—I don't have the language in front of me. I would be happy to submit it to you. It talked essentially about acts aimed at civilians or in reckless disregard to the damage that would be done to civilians by the attacks, and sought to distinguish between revolution, which is consistent with the rules of war, about what revolutionaries are entitled and not entitled to do, and attacks on civilians.

There is a definition, I would point out to you, in the Foreign Intelligence Surveillance Act, which authorizes electronic surveillance as part of counterintelligence investigations by the FBI.

That is a good definition.

Senator TRIBLE. That's a good definition?

Mr. HALPERIN. I think that would be a good place to start. In fact, it might be a good place to stop. It is something Congress has already enacted, and it is the definition that the FBI uses in conducting counterterrorist investigations.

Senator TRIBLE. Thank you.

Mr. Helton.

STATEMENT OF ARTHUR C. HELTON, ESQ., LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS

Mr. HELTON. Thank you, Mr. Chairman and members of the committee.

I want to thank you for inviting our testimony on this question respecting the Supplemental Extradition Treaty between Great Britain and the United States.

What I would like to do in my testimony, which I will summarize, having made available previously a written statement, is to focus on the question of the relationship of this extradition treaty and extradition reform initiatives generally and the law of political asylum and refugee matters.

Questions of asylum and refugees have arisen sometimes somewhat casually or sometimes somewhat technically in the course of this hearing, and that is what I would like to devote briefly my testimony to.

As Senator Biden underscored, hard cases not only induce courts to make bad law, but they provoke extreme responses from policymakers. I think that problem is illustrated well by the approach taken with this particular treaty.

The danger is that a situation is created under this treaty or even a precedent established by this treaty, as Senator Dodd quite correctly pointed to, with respect to other prospective bilateral arrangements, including the Philippines, South Korea, or wherever else, where bona fide refugees could be extradited to their home countries to face persecution.

What I would like to do in my testimony is to raise a cautionary note concerning that situation and the precedent established by this treaty.

The current approach under the law of extradition and under even the treaty that currently exists between the United States and the United Kingdom is a situational approach, unrelated to the individual facts and circumstances of individuals. It includes the tripartite inquiry into whether there was an uprising, as that term has been bandied about, whether the individual in question is a member of that uprising group, and whether the act in question was in furtherance of that uprising.

Indeed, because of this somewhat mechanistic approach, there has been occasional, and even perhaps understandable, criticism in the public directed to those few decisions in the courts which have withheld extradition where the courts have followed the precedents and engaged in a somewhat antique, mechanistic, situational analysis. It is difficult for the public to understand the quality of justice under those somewhat antique standards.

The treaty in question, however, imposes on the currently mechanistic analysis simply a categorical exclusion respecting certain kinds of crimes, which include hijacking, crimes against internationally protected persons and hostage taking, which are already covered by other multilateral treaties, which can, under international law principles, be squared with our treaty obligations concerning refugees.

Beyond that, this treaty goes forward and includes homicide, assault, kidnaping, weapons possession, and certain offenses relating to explosives and property damage which, under no circumstances, can be deemed political in character.

This approach contrasts quite starkly with the approach that would be taken in the area of asylum and refugee law.

The United States is a party already to a multilateral treaty concerning refugees, the "1967 Protocol Relating to the Status of Refugees," to which it acceded in 1968, thereby becoming a party to that U.N. treaty.

Under that international law standard and its implementing domestic legislation, the Refugee Act of 1980, an individual is eligible for political asylum in the United States if they either have been persecuted in their home country or have a well-founded fear of persecution upon return there based on race, religion, nationality, membership in a particular social group or political opinion.

Now many times, where individuals have applied for asylum, they are deemed ineligible for refugee protection in the United States under the international regime of law and our domestic statutes and regulations if they have committed so-called serious non-political offenses.

That is, in many ways, the flip side, if you will, of the extradition question. Many times you will find in the cases that there are extradition proceedings pending concurrently along with deportation and asylum proceedings. That has been mentioned many times in this hearing and indeed includes many of the cases discussed and cited at this hearing, including the *McMullen* case, and the currently pending *Doherty* case.

Now, an individual is not worthy of refugee protection if he has, again, committed a serious, nonpolitical offense, and there is an analysis to look to under the international standards.

First of all, is the offense political? This is determined essentially by looking at the purpose of the offense and the proportionality of the conduct judged against the alleged purpose of the offense.

Even more telling, is the offense serious? The question here involves a balancing test between the gravity of the crime in question and the gravity of the persecution that would be feared upon return by the individual refugee. That kind of balancing test is one that, in the asylum context, the immigration authorities entertain in many different circumstances and, indeed, the leading domestic case on the issue endorses that balancing test.

Although some have recently suggested we have departed from that test, that simply is not the case. We, as a country, at this point, still subscribe to international law on that question, and we balance the gravity of the offense against the gravity of the persecution feared.

I suppose the best illustration of a situation where we might look to that kind of analysis occurs in the so-called escape context. Obviously, depending on the circumstances, there might well be individuals who possess weapons, or assault or even conceivably kill a guard, or even utilize—I hesitate to use the word "commandeer" in view of Senator Eagleton's comments—a vehicle in connection with escaping from unjust imprisonment or torture or other circumstances, which many would agree would warrant the individual having refuge in the United States.

That is the case even though those particular crimes could constitute extraditable crimes for which an individual would not be able to avail himself or herself of the political offense exception under the terms of this treaty.

The standards for that reason in the asylum area are an appropriate reference to which we may look to determine the criteria for what might constitute a political offense in the extradition area.

This is not a hypothetical concern. I am personally aware of refugees from the Philippines, from Pakistan, from South Africa, or from Guatemala, who, indeed, have reported the lodging of warrants in the criminal systems in their home countries and requests for extradition were either forthcoming or expected shortly.

Mr. Chairman, I think we can certainly join you and the other members of this committee in emphatically stating that terrorism is an abhorrent act which has no place in civilized society. The question is really the proper approach in squaring our obligations concerning refugees with those concerning extraditees looking to avail themselves of the political offense exception.

I think it goes without saying that any government, including Great Britain or the United States, can, in furtherance of so-called larger aims, overlook individual interests. Care must be taken, in our view, so that in the zeal to eradicate terrorism we do not also unintentionally eradicate basic human rights for refugees.

The administration witnesses who have appeared before this committee and testified to this issue have simply failed to recognize this danger, and the approach taken in this treaty would, indeed, risk depriving bona fide refugees of protection from those kinds of human rights violations.

Thank you very much.

Senator TRIBLE. Mr. Helton, I want to thank you, and I want to thank Mr. Halperin before you.

Next we will hear from David Carliner.

STATEMENT OF DAVID CARLINER, ESQ., CHAIRMAN, THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

Mr. CARLINER. Thank you, Mr. Chairman.

I am here for the International Human Rights Law Group, and, like the other witnesses before you, thank you for the opportunity to appear.

I, I'm sure, along with the other witnesses, empathize with the members of this committee and the Senate in dealing with what is obviously an excruciatingly difficult question, one which concerns our organization, in a manner of speaking, perhaps more than others which do not have as part of their title "international human rights law."

There is certainly no international human right involved in murdering Lord Mountbatten or committing the kinds of offenses that the people we are talking about have committed. Yet, the context in which many of these offenses have been committed implicates human rights and certainly implicates international law.

We are here, I must say, in a somewhat ambivalent position, because none of us, I am sure, wishes to condone the kind of conduct which has been committed by people who are described as terrorists.

I use the phrase, "described as terrorists," because I am very uncomfortable with that phrase. What we are talking about are basic common law crimes—when you murder somebody, kidnap some-

body, hijack a ship, hijack an airplane. These are offenses which are described by law, and the word "terrorism" does not add anything to the element of the crime. Other aspects of the use of the word "terrorism," which trouble me, are that it is usually applied to people who are fighting against lawful authority.

I say lawful authority, but terror also has been used by governmental authority itself. One has only to look at the conduct of the police and soldiers in South Africa, where they are conducting in *terrorem* activities against the black population there. One knows that the people who won the French Revolution in the first years of the French Revolution—or so I understand, although I am not a historian—coined the word "terror." Terror is used by many governments, by many ruling classes, by many existing states in order to subject a population into obedience and suppression.

Senator TRIBLE. Mr. Carliner, let me interrupt you for just a minute. Would you pull the microphone a bit closer so that you can be better heard.

Mr. CARLINER. I'm sorry.

In discussing this question, which is a very hard one, I think that the use of emotional terms and the description of offenses which have to repel any person of any sensitivity for the regard of the value of human life—must be more analytical than some discussion of this issue, although I think the discussion this morning has probably anticipated the arguments that we would make.

The two basic propositions I would like to urge before you, Mr. Chairman, are ones that derive from a statement that you yourself made early this morning, referring to the fact that the Congress of the United States has adopted legislation which seeks to implement human rights as part of the foreign policy of the U.S. Government.

My point of departure from your statement is that it must be implemented, we believe, in a way which applies no double standard.

What troubles me and our organization, to the extent that I speak for other people, is that the treaty that is before the committee lends itself to a double standard in the treatment of crimes which are, without doubt, heinous, which are repulsive, and which in those circumstances should be forbidden.

Judge Sofaer, who was a very distinguished judge before he became the Legal Adviser of the Secretary of State and who was a distinguished professor of law even before that, gave testimony before this committee which, it seems to me, demonstrates the reason for not adopting the treaty.

He has pointed to the Government of the United Kingdom as a stable democracy and, therefore, says we should adopt a treaty with that government because it is a stable democracy.

If that is to be the criterion, as my colleague, Mr. Halperin, has pointed out, there are some countries which have been regarded as stable democracies which are no longer democratic and probably are not very stable.

We can point to other countries. One, which is described as the largest democracy in the world, and whose prime minister said, contrary to other belief, that it was the oldest democracy of the world, is India. It was truly a democratic country up until Indira Gandhi declared martial law one day, and from one day to the next

it became a government which suppressed the rights of the people there. Had we a treaty with India, under Judge Sofaer's definition we would have been required to send people back to that country for various types of prosecution.

Let me give you another country, if I may, Mr. Chairman, in the catalog of horrible examples. The Government of Germany, the Weimar Republic, was a democracy. We know now that it was not very stable. But in February or March 1933, a person was elected Chancellor of Germany, whose name was Adolph Hitler. At that time, it was a stable democracy.

In July 1944, there was a generals plot which had as its purpose murdering, executing, assassinating—whatever word you want to use—Hitler, to put an end to Hitler's life. I am sure that very few of us would feel that were that to have happened in 1933, by natural death or by other type of death, we would all have been much better off.

What I am suggesting is there are certain kinds of murder, certain kinds of offenses, which should have been cut out of this treaty, for which it would be unspeakable to return the perpetrators of those crimes to the countries where the crime was committed, to be tried.

Senator Eagleton and others have sought to proscribe hijacking. Can one look with hostility, to reject the Jews, who hijacked an airplane from Leningrad, a city in a country which makes it very difficult for Jews to leave freely?

In 1936, I believe it was, Chiang Kai-shek was kidnaped by a major figure military figure in China, who held him in custody in order to negotiate with Chiang Kai-shek an agreement whereby the Chinese Government would conduct a war against the Japanese.

Is that the kind of kidnaping which is a heinous offense? Should the person who committed that kidnaping, had he fled to the United States, be extradited to China in order to stand trial?

I give these illustrations to show that to have a categorical exclusion of even the most heinous offense would result in hard cases making bad law. We should turn that aphorism or cliché around so that perhaps soft cases should make good law.

As to the notion of stable democracy, assuming that the democracy is stable, one can't say that even a country with the most established democratic principles does not violate the human and political rights of people from time to time. At the risk of being somewhat controversial, let me refer to episodes which have occurred in the United States.

At the Capitol of the United States a number of years ago, a number of political assassins, Puerto Ricans, came to this country and shot up the House of Representatives.

Although we are a democratic country, one cannot say that our form of government allows the people of Puerto Rico to make a free choice whether they should be part of the United States.

Even in the city of Washington, DC, of which I happen to be a native, we did not have, until 1972 or 1973, the right to elect our own mayor, or city council. Even today, we do not have elected members who can vote in the U.S. House of Representatives or sit in the U.S. Senate.

Although we are a democratic country, I hope that no one in Washington, DC, wants to use the kinds of methods that other nationalist groups have adopted. We don't see any evidence of it.

But one cannot use the phrase "stable democracy" as a necessary hallmark for determining how other people seek to assert their political rights. It would be an act which would be injurious to the U.S. Government itself.

Our country has been alleged to have been implicated in certain conduct with regard to heads of state—to be blunt about it, activity which was designed to cause an early, premature death of at least two heads of state. We were involved in destabilizing the Government of Chile. I don't know whether destabilization involved simply economic methods or may have involved the possession of firearms with intent to use them.

But we have been implicated in the overthrow of the Guatemalan Government, as I recall it, in 1954. I have no doubt that if we overthrew a government, force of arms was necessarily used.

If we are going to adopt a treaty with regard to the United Kingdom because it is a stable democracy, our conduct, if we allow people to be extradited to England or to Ireland for conduct for which they would not be extradited to other countries, I think would be regarded as sheer hypocrisy in the rest of the world.

That is one point that I wish to make.

The other point which I would like to make very strongly regards the mechanism, the forum within the United States for determining what is a political offense and whether a person should be extradited. One recognizes, of course, the power of the President, like the power of the Governor, in any ultimate situation to decide whether or not to send a person back to a particular country to stand trial.

But before that decision is made as the last power of the President or the Governor, which is analogous to the act of pardoning someone, I suggest that "judicializing" the method rather than politicizing the method is the most appropriate one.

I say this from a depth of experience in a field in which my colleague Mr. Helton also practices, having to do with the State Department in rendering advisory opinions, as they are called, on applications for political asylum. I would recommend to Judge Sofaer that he look at the operations of the Bureau of Human Rights and Humanitarian Affairs in deciding asylum applications.

The procedures and the criteria of that agency of the Department of State are wanting. They are reached by political decisions—and I say this deliberately—based on foreign policy considerations of the U.S. Government.

I can give one illustration.

After Khomeini came into power—about 2 years afterward—the Bureau of Human Rights and Humanitarian Affairs rendered a decision in which it said that Jews and Christian Armenians, among two categories of people in Iran, are not subject to religious persecution in that country, because the constitution of Iran assures religious freedom.

It went on to say that if you are a Zionist and you can show that you have contact with the Government of Israel, you might not get a fair trial.

This was a decision rendered after one Jew had been executed who had contacts presumably with Israel, and an additional 10 or 12 Jews were also murdered, either by the revolutionary guards or by other authorities in Iran.

The execution of these Jews and similar treatment of Ba'hais and Armenians simply chilled those ethnic and religious minorities in Iran. The decision of the State Department was egregiously wrong.

Subsequently the State Department changed its decision. But one of the factors that goes into State Department decisions are foreign policy considerations, political considerations vis-a-vis what we want to do with the future government.

I suggest that a method in which a court, which is independent, which is not concerned with extraneous considerations, but can decide, apart from other factors whether a person has committed a political offense and through positive inquiry whether he is likely to get a fair trial, as an institution which has no overall political responsibilities, as does the Secretary of State, is a far better one for assuring due process, fairness, and to assure that the political offense exception will be adhered to.

So, for these basic reasons, Mr. Chairman, I was pleased to hear that at least one member of this committee believes that the treaty should not be subjected to a country-by-country approach, but that there should be a universal approach by legislation, which would tend more to assure uniformity of treatment. But even in that legislation, we believe that steps should be taken to permit the consideration of even heinous crimes, where they are committed in the context of political activity, to be regarded as a political offense and to assure that determination of these questions should be made, at least at the first level, by a judicial tribunal, rather than by a political tribunal.

Thank you very much, Mr. Chairman.

Senator TRIBLE. Mr. Carliner, thank you very much.

Professor O'Dempsey.

Ms. O'DEMPSEY. Mr. Chairman, I wonder if I could defer to my colleague, Mr. Durkan, who sits at my right.

Senator TRIBLE. Yes; please tell us who Mr. Durkan is. He is not on the committee's formal agenda. He is certainly welcome.

Why don't you introduce Mr. Durkan.

Ms. O'DEMPSEY. The gentleman seated at my right is Mr. Frank Durkan, who was mentioned by Congressman Gilman as one of the witnesses for this afternoon. He is a member of the Brehon Law Society of New York City. He is an experienced attorney, who has represented an IRA member in an extradition proceeding and has a wealth of knowledge about Irish history and Northern Ireland.

Senator TRIBLE. Mr. Durkan, at the outset, why don't you tell us what the Brehon Law Society is.

STATEMENT OF FRANK DURKAN, ESQ., O'DWYER & BERNSTEIN, BREHON LAW SOCIETY OF NEW YORK

Mr. DURKAN. The Brehon Law Society, in a nutshell, Senator, is a group of Irish-American lawyers who got together to look into the situation involving Northern Ireland and the deprivation of

civil rights in Northern Ireland, and to render what assistance we could to those who found themselves in precisely the position of the clients that ultimately we came to represent.

In this particular instance, Professor O'Dempsey and I both represented Desmond Mackin. That is one of the four cases that I think has us all here today.

I will synopsise my positions, which are in my statement.

I would like to briefly take them in the reverse order in which they are presented.

Senator Dodd has already touched upon the *Barr* case. That brings me to the first day of the hearings, when Judge Sofaer sat here and told us that never would the State Department do anything that could be regarded as unfair, and that the reason and the premise for the changing of this treaty, of the present existing treaty, one of the reasons, is that we have a similar system in Great Britain to what we have here in this country.

Now, he did not mention Northern Ireland, but, ultimately, it came out, because I think by now just about everybody has heard a tremendous amount of what the Diplock court system is and how bad it is.

To that extent, his mention of the *Barr* case showed that the State Department took a statement of a supergrass, which said, in effect, I told Barr go up to the corner and look around. On the basis of that statement and that statement alone, he was arrested by the authorities in Philadelphia, and he spent a year in jail on an extradition request, of that nature.

The State Department never bothered to look to see whether or not there was any substance to it or anything else.

That brings me to my second point, in reverse order.

The Diplock court system, which they claim is fair, is a system that has come into being as a substitution for internment without trial.

In 1972, when the treaty that we are now attempting to amend or supplement was signed by the British, what were they doing? They were interning the citizens—and I am talking about the Catholics—of Northern Ireland without trial. They were dragging them from their beds. They were throwing them into jails, and they were leaving them there. And they left them there until 1975, and in some cases until 1976.

This same system, which the State Department represents to this Senate panel as fair and just like ours here, this same system was convicted before the Court of Human Rights in Strasbourg, in 1978, of torturing its citizens, of abusing them and humiliating them and inflicting inhuman treatment upon them.

The following year, Amnesty International found the government that is asking you, Mr. Chairman, and every other Senator in this panel to help them guilty—it was found guilty, by Amnesty International of cruel and inhuman treatment in the interrogation of suspects in the interrogation centers of Belfast.

Since 1980, up until the present time, we have a shoot-to-kill policy. I believe there has been ample documentation about the shoot-to-kill policy where the security forces, with impunity, are shooting down men and women and children in the streets of Northern Ireland.

This is the regime that now comes along and asks this Senate panel to help them out, to further punish the victims of that kind of oppression.

When we talk about internment without trial, and when we talk about torture, we are always thinking about maybe the Dark Ages or maybe the last century or maybe Hitler's camps. We are talking about the country that now asks us to eliminate the one last vestige of protection that they have, and send these fellows and these girls back to the Diplock courts.

In listening to the questions put by the Senators—and I am now at point No. 1 in my statement—it would appear that all one has to do to avail of the political offense exception is to hold up a label and say I am a political offender, show me.

Well, Ms. O'Dempsey and I spent 11 months trying the *Mackin* case. Believe you me, Senator, it was no easy task.

Every single aspect of a political offense exception was put to the test. We had to prove, as the law requires—and we were before a competent and an eminent magistrate, Naomi Buchwald—we had to prove to her satisfaction that there was a state of war, revolution, or rebellion going on in Northern Ireland, and although Senator Eagleton is ready to stipulate it here, believe me, the British were not ready to stipulate it. They flew three individuals across the Atlantic to swear before God and flag in the United States district court that there was nothing wrong in Northern Ireland. And we had to prove otherwise.

When we finished that, we had to prove that Mackin's act was done in furtherance of and in connection with the war, revolution, or rebellion. And at the time the British were saying there was nothing wrong, the Court of Human Rights in Strasbourg had records of their derogation from the principles of that court and of the convention to the effect that there was a war going on that was threatening the life of the nation.

We have had it year after year, lie after lie. And they would now like to lie to this panel and to tell us that if we eliminate this protection that they have, that they are going back to a fair and just system.

Senator, that is what they are asking you to do, and that is what they are asking every other member of this panel to do.

If Miss Liberty in the harbor has any meaning, then she means that we will not turn over the wretched refuse and those who are looking for help, that we will not turn them back, willy-nilly, at the instance of or at the whim of the particular Secretary of State at the time.

I don't think that this treaty is necessary. The one that is there is already adequate. If you were to ask me should it be changed, I would say it ought to be changed to give them a better chance than they have.

[See appendix.]

Senator TRIBLE. Mr. Durkan, let me just ask you one question. This is a procedural question.

You indicated that Mr. Barr was arrested in the United States and languished in jail for over a year. Isn't there some kind of time requirement for a prompt hearing?

Mr. DURKAN. There is a time requirement for the filing of the papers, but there is no time requirement that I know of that says he has to have a hearing or a trial within a specific time.

I do know that Des Mackin sat for 15 months without bail in the jail in Manhattan. I know that Joe Doherty, who is another of the four cases, is now on his 3rd year without bail in the Manhattan Correctional Center. Senator Eagleton said this morning that Liam Quinn is running around San Francisco. He is in jail on his 5th year, and he cannot get bail.

So, for the potential extraditee, it is a long and onerous road with lots of obstacles with the Government screaming terrorism at every turn in an attempt to delude the judges away from the specifics of the extradition law.

Mr. HALPERIN. Mr. Chairman, I wonder whether I could add a comment on that.

The standard practice in extradition is for people to be arrested and placed in jail upon a representation of the foreign government that it will provide evidence of probable cause.

I, for the life of me, do not understand how that can be constitutional. I thought the Constitution was very clear, that a person in the United States could not be deprived of liberty without due process, and that included probable cause that they had committed some offense.

It is also the case that bail is not available except in extraordinary circumstances to a person who is so held, which it seems to me also is clearly a violation of the constitutional right to bail.

But that is the procedure, and those are two elements of the extradition law which I think urgently cry out for consideration by the Congress in any reevaluation of the law.

Mr. DURKAN. Senator, I would like to add, briefly, we won the *Mackin* case, and we could not get Mackin out on bail. Joe Doherty won his case 6 months ago in Manhattan, and he is sitting in jail without bail. Nobody will give him bail.

And what did Mackin want? He wanted to go back to Ireland to his wife and kids. That is what he wanted. He did not want to stay here, as Senator Eagleton suggested, to avail of all the largesse we could give him. Every single facet of the law as it exists now is against the potential extraditee. And, instead of ameliorating their circumstances, we want to tighten the noose further at the request of the regime that I have just described, that has been found guilty of torture, that has abused and maligned its people.

What of George Washington? Wasn't he a terrorist? What about him? What about all the rest of them, who attempted to throw off the yoke of repression, the yoke of savagery, which has bound the people of Northern Ireland for 60 years? There has been emergency legislation in effect for every single decade of the last 60 years.

The Prime Minister of South Africa, Senator Biden said it the other day, that we are squabbling about how they could curtail the blacks—he said forget your arguments, let's adopt the Special Powers Act of Northern Ireland and that will solve everything.

That is Northern Ireland. That is where we are being asked to send these people.

It is an outrage. It is an outrage that they even asked.

Senator TRIBLE. Mr. Durkan, I will tell you that I just finished a biography of the life of George Washington, and I did not see anything in there that provides a precedent for the kinds of activities that we are talking about. I'm not sure he is a useful model on which you should premise your case.

But let me ask you something more relevant to our discussion here—or let me simply comment.

It seems to me there ought to be an assurance of a prompt disposition of these kinds of cases. As a former prosecutor in the Federal System and in the State system, in Virginia, at least, in both the Federal and State systems there is a requirement that cases be resolved within 120 days. That was a court imposed requirement, long before a generic requirement was adopted by the Federal Court System.

Is it 120 days nor, or 90 days? There is a requirement that you be brought forward and that a case, at least a *prima facie* showing be made by the state or the Federal authorities if they establish probable cause for holding you for a further hearing.

I would say that I am not so troubled that someone could be held, at least temporarily, on a representation of a nation state. Indeed, if Italy had held the PLO terrorist on our representation that he should be held and extradited, then I think the world would be a bit better. But I certainly do subscribe to the view that these proceedings ought to move forward in a very prompt and timely fashion, when you are talking about someone's life and liberty.

Mr. DURKAN. The probable cause feature of extradition, Senator—all they have to do is spell out in an affidavit a *prima facie* case of violation of law. You may not challenge it. You may not say oh, that was not me, I was not there. They do not allow such inquiry.

If the affidavit says Joe Smith took a gun out of his pocket and shot Soldier A, that is enough to hold him under probable cause. Joe Smith can't say I was someplace else or I did not do it, or I could not do it.

That is why the *Barr* case, which Senator Dodd cited, gives us an insight into what the State Department thinks. The affidavit of the supergrass said I told Barr to go up to the corner and look around. That was all it said. Whammo—into the slammer goes Barr, and he sits there for almost a year.

Senator TRIBLE. I thank you for those insights.

It occurs to me that perhaps Mr. Barr had some other problems. Didn't he enter the country illegally?

Mr. DURKAN. Yes.

Senator TRIBLE. Wasn't he being held on that basis?

Mr. DURKAN. Yes, initially he was picked up on a charge, and I believe he was acquitted on it, but they held him without bail on the extradition charge, which the British brought forward, on the basis of a supergrass, Kirkpatrick, who made sweeping statements implicating something like 35 people. The depth of the implication against Barr was that he told him to go up to the corner and look around.

But the point is that our State Department was able to take a man's liberty away.

Senator TRIBLE. I understand that. You have made that point loudly and clearly. I think it is a telling one.

Thank you.

Judge Maier.

STATEMENT OF JUDGE EUGENE E.J. MAIER, COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT, PHILADELPHIA, PA, AND PRESIDENT OF BREHON LAW SOCIETY OF PHILADELPHIA, PA

Judge MAIER. Senator, I submitted remarks on September 18, and basically will rest on those, although there are a couple of areas that I would like to address. One has to do with a question that you asked and that Senator Eagleton also commented on. Senator Eagleton indicated that he agrees that there is an insurrection or a civil war going on. And I believe you addressed the question to one of the earlier panel members as to how many people must be involved in order to make a rebellion or an insurrection.

I would suggest that basically a rebellion, an insurrection, or an armed uprising would be like beauty, it would be in the eyes of the beholder. I think the people who have to be concerned with that would be those who are doing the rebelling and the government that is being rebelled against.

A propos of that, I would like to give you some evidence, some indication that a casual observer in Belfast would see, that I saw in August, when I was there. We visited Belfast and we toured the Maze Prison, and we talked with some of the prisoners there. We were only able to spend 2 hours, probably 2½ hours at the very most, in Belfast itself. I found the following indications, and I think these are objective evidence that you can reach whichever conclusion you would like on.

On the streets of Belfast, there are troops who stop and search citizens. These are all things that were seen by me. They can ask their name, address, their age, where they are coming from, where they are going to, and their business. That is what the citizen is required to ask. Then they will go on and ask for other information, and sometimes a citizen gives it to him and sometimes he does not.

As indicated earlier, there were bombed buildings, some bombed 6 months ago, some 3 months ago, some 3 days before we got there. There are areas which are restricted to traffic. Only certain automobiles with certain types of stickers can go down there—again, to prevent bombings or problems of that nature with the automobiles.

As we were going out with a driver from the Maze Prison, he pointed out to us a cemetery, where he said that is where a lot of the IRA people are buried, and usually with military trappings.

We went to one of the political headquarters in Belfast, and we found 3 foot in diameter boulders spaced outside, and the entrance all fenced in so that no one could get within 5 or 6 feet of that building with a car bomb.

There were separation fences which created Protestant and Catholic ghettos, separation fences not like we are thinking about in terms of the back of our house, but separation fences 20 feet high and perhaps 50 feet long, stretching from the end of one row of houses to another, which absolutely prevented any commerce be-

tween the area, any ingress or egress. These were made out of corrugated metal and thick wooden planking.

In addition, they had street barriers preventing people from going from areas to other areas. We saw a sniper patrol of about eight young British soldiers—they could not have been any more than 17 or 18 themselves—and one would go flat against the back of the wall, with his rifle at the ready, while another person leapfrogged, checking on things.

These are things that I saw from the cab.

As we stopped, the man looked in, saw my camera, and the inference I got was I was being ~~dared~~ to take a picture. I obviously did not because I am here.

During that period of time, there were three cabs, three taxis of people dressed similar to myself, and after a short period, the police were trailing us in an unmarked car.

Then, when we got to the Maze Prison, there is a de facto recognition in Maze Prison that the soldierly activities occur because they have the prisoners divided into three areas. They have a Republican group of cell blocks, which comprises the most, a Loyalist and a mixed area. All the people there admit readily that they did whatever they are there for, and they all also admit, even the people in the mixed area indicate that the reason they did the things were for political purposes.

One person I spoke to in the mixed cell, who was convicted of murder, was a Loyalist, and when I asked him why he was in a mixed cell—I would have thought that he would have trouble getting along—he indicated that the reason that he did not have any problem getting along inside is because they did not discuss politics. Those were exactly his words.

I spoke with the governor of Maze, and I spoke with the governor of Longkesh Prison, and in Longkesh Prison it is beyond de facto. It is actual recognition. He indicates very clearly that the people from the Republican side are segregated and the Loyalist side is the other, and he deals primarily with their leaders.

When we were in the other side of Northern Ireland, entering Belleek, the entrances both on the Republican side and on Northern Ireland have sandbagged entrances, with armed soldiers, armed border guards, and TV surveillance inside Belleek itself.

Then, of course, there are news reports of some rebel control in some areas.

I don't know how you can look at those criteria, those things that I have observed myself, and not arrive at the conclusion that certainly there is an armed rebellion or an insurrection occurring.

I think, if we can accept *arguendo* that, in fact, it has occurred, and in fact it exists now, I think we then have to determine who is best suited to determine that for purposes of extradition, and that is what the purpose of this treaty is.

Again, I would like to look at those areas that I think would get somebody to arrive at that conclusion.

If the decision is going to be made by the State Department as to what is a political offense exception, as it would be, basically, under this treaty, we would be talking about a decision by a political appointee without tenure. That raises a question of political consideration, employment consideration, and those things lead

somebody to believe that either possible, actual bias, or at least perceived bias can occur. There would be no question of recusal. There would be no published standards, no rules of evidence, no body of law, secret, unrecorded proceedings, no counsel, and no appeal.

The flip side of that is can you continue to do it the way we are now doing it, basically before the courts, where you have a person who will hear the case, either a magistrate or, as in the *Barr* case, one of our district court judges in Philadelphia who is tenured and who has no political considerations or employment considerations, and therefore there is probably no bias.

But, if a person thinks of bias, you do have recusal, you do have published standards, you do have rules of evidence, bodies of law, public, recorded proceedings, appellate review, competent counsel, and you have an experienced factfinder. In short, what you have is an appearance of justice.

You do not have it otherwise.

You have heard about the *Barr* case. I would raise that for one small point.

In fact, on this, the State Department, and, hopefully, somebody from the Justice Department, submitted that on behalf of the United Kingdom and Northern Ireland. Presumably, somebody looked at that probable cause affidavit before it was submitted. Apparently, they either did not look at it, or, if they did look at it, they ignored it.

Now, one could raise a question if one were even remotely suspicious, that maybe they did that for a reason. Maybe they did that because they thought the judge would just rubberstamp it and send it back. Maybe it was an honest error. Maybe it could have been any number of things.

The question that is raised by this is not whether there was probable cause because, very clearly, there was not any. The reason I raise it is simply because any reasonable person could arrive at the conclusion that the State Department may have had a motive, other than fairness and justice, when they submitted that and when they went before the court.

For these reasons, Senator, and for the reasons that we set forth in our September 18 submission, the Brehon Law Society would ask that this committee and the Senate not ratify the treaty.

Thank you.

Senator TRIBLE. Thank you.

Senator Kerry.

Senator KERRY. Mr. Chairman, thank you.

As the chairman well knows, the schedules around here are less than conducive to constant questioning and attendance at these hearings, and I wish it were otherwise.

I, unfortunately, cannot stay because of prior commitments and would like to take just a couple of moments, if I may, for two purposes.

One, I would like to submit some questions to the panel in writing, if I may, Mr. Chairman.

Senator TRIBLE. Senator Kerry, your comments are always welcome, and will be made a part of the record.

Senator KERRY. Thank you, sir.

Senator TRIBLE. I would tell you that yours are the last words in the session here today, so wax eloquently.

Senator KERRY. Well, I don't want to wax too eloquently.

Mr. Chairman, the first thing I wanted to do was to genuinely thank you for your patience and to say to you that I think you have given all of us a great deal of time and we are all appreciative of it.

However, I think a lot of us still feel that there are some issues which do bear some further analysis and discussion, and I would certainly hope the chairman would allow us to have that opportunity. I am mindful of the fact that I know you really have been very fair and given us a great deal of time.

Let me just draw to the chairman's and the committee's attention some of those concerns that I think we ought to look at.

It seems to me that Judge Sofaer's August 1 testimony, in which he said, and I quote him: "The European Convention on the Suppression of Terrorism adopted restrictions on the political offense exception nearly identical to those contained in the Supplementary Treaty."

I think subsequent testimony has indicated that the proposed treaty, in fact, far exceeds the European Convention in terms of narrowing the political crimes exceptions, and I think, therefore, that the judge's analysis and that approach is something the administration's own initial reasons for this bear increased scrutiny.

Second, he said, and I quote: "The British system of justice provides fundamentally fair treatment to all, including both Republican and Loyalist terrorists." That is on page 12 of that transcript. Subsequent testimony and the administration's own analysis of the Diplock courts, at least at this time, seems to reveal that there are fundamental dissimilarities between our judicial system and that of Northern Ireland which most of us feel we ought to analyze further.

I think my colleague from Missouri earlier said that he would like to see that analysis in addition to the other analysis that he talked about with respect to terrorism itself and some of the opposing views.

But, specifically, the law of search and seizure is significantly different. No warrant is required to search a person or vehicle in a public place. Police or British soldiers can enter any premises, except a dwelling house or vehicle to search for munitions or radio transmitters. The search of a dwelling without a warrant can be authorized by any superior officer. There is no exclusionary rule for any kind of illegally seized evidence. The law of detention is clearly very different, puzzling, and disturbing. Anyone suspected of being a terrorist can be held for up to 72 hours. The term "terrorist" is not defined.

I will go on. Under the 1984 Prevention of Terrorism Act, the Secretary of State—not the court, but the Secretary of State for Northern Ireland—can authorize detention for questioning for up to 7 days. Police in Northern Ireland can release a suspected terrorist after detention under either the 1978 Emergency Provisions Act or the 1984 Prevention of Terrorism Act, and then rearrest him under the other statute. There is unlimited administrative detention which can be reactivated by the British Secretary of State

at any time. The juvenile justice system is significantly different. Young people between the ages of 14 and 16 can be held in adult prisons while awaiting trial. The British Secretary of State can authorize juveniles to be tried and punished as adults.

We all have heard testimony about confessions, extensive criticism of police interrogation methods used to produce them, and defendants in Northern Ireland have the burden to show that a confession has been coerced—the burden to show it. Grounds for the denial of bail are much broader in Northern Ireland than in the United States, but in the United Kingdom the burden for denying bail is on the prosecution in Northern Ireland. The defendant has to prove that the requirements for bail have been satisfied—a basic distinction between the United Kingdom and Northern Ireland.

Freedom of assembly shows significant differences. Accomplice testimony shows significant differences.

I think that all of those differences ought to really be examined thoroughly in front of this panel in such a way that we can really weigh the implications of this particular change on the political exception doctrine.

In addition, we have heard testimony about the *James Barr* case which raises very significant issues about executive discretion.

I think this next point is very important. An analysis of the United Kingdom Suppression of Terrorism Act of 1978 reveals that its schedule of offenses is virtually identical to that found in article I of the supplementary treaty, raising a question about the negotiating history of the treaty. If we initiated negotiations, it seems very strange to me why the final result embodies the form of British domestic statute, which contains a number of offenses that are not criminal acts in the United States.

I am not satisfied yet as to why that is the situation or as to what the implications of that may be.

Finally, Mr. Chairman, I remain concerned by the fact that there are only two cases—there are two on appeal, now—but there are only 2 cases on record where extradition has been denied, out of 74. No United Kingdom resident, to our knowledge, has ever sought asylum in the United States or been granted it, at any rate.

I think that this analysis is a terribly, terribly important one which, notwithstanding the amount of time it is taking, is something we ought to delve into and pursue further.

This Senator certainly requests that of the chairman and of the committee, and I thank the chairman again for his patience.

Senator TRIBLE. Senator Kerry, I thank you for your comments. Professor O'Dempsey, would you care to add a word?

STATEMENT OF KEARA M. O'DEMPSEY, ST. THOMAS SCHOOL OF LAW, MIAMI, FL

Ms. O'DEMPSEY. Senator Tribble, I would, yes.

I would like to direct the attention of you and Senator Kerry and possibly of the staff members who are present to my statement and to the very, very lengthy, but I hope informative, appendix which is attached to it. I believe you will find here extremely well documented many of the things Senator Kerry has just pointed out, but also some facts which are simply so shocking that you will find

them difficult to believe—murders of Catholic children on the streets of Northern Ireland, for which grown, heavily armed soldiers, were never even brought to trial. These are absolutely indefensible murders which have never been vindicated in any way whatsoever.

I think when you read this, if you can, if you do, you will understand far, far better why for those of us who are familiar with Northern Ireland have such great difficulty in understanding why you think this treaty brings perpetrators of violence to justice.

This treaty enables perpetrators of violence to continue to perpetrate it against the Catholics of Northern Ireland.

This treaty is a sweetheart arrangement with a regime that we have very, very little in common with. If you can peruse the materials that I present, I believe you will see that.

Great Britain has made penal laws almost against thought crimes. It is a crime to have knowledge and not to tell the police. It is a crime if you are told to live in Northern Ireland to go and live in Great Britain, or even to visit Great Britain. It is a form of internal exile, which we strongly condemn in the Soviet Union, but which we now propose to accept and approve through this treaty.

Thank you.

Senator TRIBLE. Professor O'Dempsey, that statement and that appendix will be made a part of the record. I can assure you that at least this Senator will read it.

Ms. O'DEMPSEY. Thank you.

Senator TRIBLE. I thank you for being here today. This completes 3 days of hearings thus far. We have heard from 20 witnesses. We have had countless hours of testimony, some illuminating, many not. But I thank you for your presence and for your contribution.

This is a matter that is complex. It is a matter that demands the thoughtful attention of this institution, and I can assure you that it will be thoughtfully considered and no doubt debated with vigor by the members of this committee.

Thank you very much.

[Whereupon, at 4:45 p.m., the hearing adjourned, subject to the call of the Chair.]

[The following was received for the record:]

APPENDIX

PREPARED STATEMENT OF ABRAHAM D. SOFAER

Mr. Chairman, members of the Committee, I am honored to appear before you to testify on the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland. This treaty was signed on June 25 and transmitted to the Senate on July 17.

This is my first appearance before this Committee as Legal Adviser to the Department of State. Since my confirmation, I have had the pleasure of consulting with individual Senators on a number of issues before the Department. I look forward to ongoing development of this constructive working relationship.

Mr. Chairman, the Supplementary Treaty addresses a problem with which this Committee is all too familiar: the difficulty of combatting international terrorism. Nearly every day, a new terrorist assault occurs somewhere in the world. The object of such atrocities is to use terror and fear to attract media attention and to coerce governments into capitulating to terrorist demands.

The public, both in the United States and in other civilized nations, is distressed and angry over the inability of governments to bring these criminals to justice. Indeed, many of our own legislators have expressed their impatience with the difficulties of capturing and punishing terrorists in foreign countries. This widespread frustration has given rise to calls for extreme measures to prevent terrorist acts of violence and to punish their perpetrators.

Mr. Chairman, I share this sense of frustration. While we must resist demands that we -- like the terrorists -- act in disregard of the law, the Department of State, in cooperation with the Department of Justice and other federal agencies, is committed to developing new tools to fight international terrorism effectively and in a manner consistent with our legal traditions and social values. Towards this end, the Departments of State and Justice, acting jointly, took the initiative to negotiate this Supplementary Extradition Treaty.

The most important aspect of the Supplementary Treaty is that it explicitly identifies particular crimes -- such as airplane hijacking and murder of diplomats -- that may no longer be regarded as political offenses excepted from the extradition process that exists between the U.S. and its historic ally the United Kingdom. The Supplementary Treaty recognizes that terrorists who commit the specified, wanton acts of violence and destruction should not be immune from extradition merely because they believe they were acting to advance a political objective.

Mr. Chairman, I will begin by reviewing the provisions of the Supplementary Treaty and their relationship to the existing U.S.-U.K. extradition treaty. I shall then discuss the origin and evolution of the political offense exception and the urgent need to implement a version of that doctrine in relations with the United Kingdom that advances rather than retards the human values and other interests historically served by international law.

Provisions of the Supplementary Extradition Treaty

The Supplementary Extradition Treaty amends the Extradition Treaty between the United States and the United Kingdom, signed at London on June 8, 1972. The Supplementary Treaty contains four substantive articles. Article 1 addresses the political offense exception; Article 2, the statute of limitations; Article 3, the time limit within which documents must be submitted in support of an extradition request following a provisional arrest; and Article 4, retroactive application of the treaty.

Article 1 of the Supplementary Treaty amends the political offense exception to extradition, contained in Article V, paragraph (1)(c) of the current extradition treaty, by identifying particular crimes that shall not be regarded as offenses of a political character. The crimes listed are those typically committed by terrorists: aircraft hijacking and sabotage; crimes against internationally protected persons,

including diplomats; hostage taking; murder; manslaughter; malicious assault; kidnapping; and specified offenses involving firearms, explosives, and serious property damage. These are not political acts, such as organizing, assembly, speech, or even espionage. They are heinous crimes, regardless of the motives of the perpetrators.

Recent events underscore the wisdom of this provision. Within the last two months, U.S. citizens have been the victims of almost every one of the types of terrorist acts excepted by the proposed treaty. How would we regard the argument that the murders of Robert Stethem on TWA-847 or of the Marine guards in El Salvador were "political offenses?" It is a shocking and disgraceful fact that criminals who commit these types of barbarous crimes against the citizens of other nations, and manage therefore to get to the U.S., are often able under current U.S. law, successfully to invoke the political offense exception and thereby escape extradition. Worst of all, in

many cases in which the exception can be successfully invoked under present law, the United States is unable to prosecute the terrorists involved, because we lack jurisdiction for most offenses committed abroad. In such cases, the U.S. is limited to deporting such persons to some third country where they can continue to elude justice. The treaty amendment before you today would prevent such travesties of justice with respect to extradition requests between the United States and the United Kingdom.

Article 2 of the Supplementary Treaty amends Article V, paragraph (1)(b) of the current treaty to provide that extradition shall be denied if prosecution would be barred by the statute of limitations of the requesting state. The current treaty permits the statute of limitations of either the requesting or requested state to bar extradition. The current formulation is included in several older extradition treaties. We have concluded, however, that the interests of justice are

better served by applying the law of the requesting state -- the place where the fugitive committed his crime -- in determining whether his trial is time-barred. A criminal should not be able to avoid prosecution by fleeing to a country that has a shorter statute of limitations than the country in which the crime occurred.

Article 3 of the Supplementary Treaty amends Article VIII, paragraph (2) of the current treaty to provide that the requesting state shall have up to 60 days following the provisional arrest of a fugitive to submit evidence in support of its extradition request; if such evidence is not submitted within that time, the fugitive shall be freed. The current treaty allows only 45 days for submission of such evidence. Provisional arrest, a common feature of extradition treaties, allows the immediate apprehension of a fugitive from a foreign jurisdiction who might otherwise continue to elude capture, while at the same time requiring the foreign jurisdiction to

substantiate its case within a reasonable time. We have concluded that 60 days is a more appropriate period, in light of the increasing complexity and volume of the documentary evidence necessary to substantiate requests for extradition. The full period, of course, will be used only if supporting documents cannot be prepared and transmitted in less time.

Article 4 provides that the Supplementary Treaty will apply to any offense committed before or after its entry into force; if the offense in question was committed before the Supplementary Treaty enters into force, it must have been an offense under the laws of both the United States and the United Kingdom at the time of commission. This is a standard provision in recent supplementary extradition treaties that the United States has concluded. Its purpose is to facilitate application of the changes effected by the Supplementary Treaty to prospective extradition requests for offenses committed in the past. The retroactive application of these procedural

provisions is fully in accord with U.S. extradition treaty practice.

Articles 5 and 6 are technical provisions that provide for the territorial application of the Supplementary Treaty, for its ratification, and for its entry into force.

Origin and Evolution of the Political Offense Exception

The overbroad application of any concept, however enlightened, can lead to foolish and antisocial results. You will understand how the political offense exception has come to produce such results, by examining its evolution and true purposes.

First, the political offense exception is above all an exception. The basic tradition of international law applicable with respect to fugitives from justice is one of cooperation between nations to enhance their capacity to maintain the lawful order and security on which all liberty ultimately depends. The oldest known document in diplomatic history -- a

peace treaty between Ramses II of Egypt and the Hittite prince Hittusili III, concluded in 1280 B.C. -- provided for the exchange of criminals of one nation found in the territory of the other. This principle of cooperation in extraditing fugitives has survived to modern times.

The great Eighteenth Century revolutions were based in part upon the notion that individuals have the right to engage in revolutionary political activity in pursuit of liberty. Those were times when today's democracies were ruled by Kings and Emperors, when universal suffrage did not exist, and when the mere open, verbal criticism of a ruler was frequently regarded as sedition or treason. In the wake of those revolutions, the emerging democracies of western Europe did not want to surrender to foreign sovereigns revolutionaries who had committed offenses in those nations in the course of exercising their political rights. The Jacobean Constitution of 1793, reflecting this revolutionary spirit, declared that the French

people "grant asylum to foreigners banished from their countries for the cause of freedom." The same sentiment gave rise to the seminal provision in the Belgian extradition law of 1833, which provided that a fugitive "shall not be prosecuted or punished for any political offense ..., nor for any act connected to such crime."

From its inception, the political offense exception has been applied without significant controversy to "pure" political offenses. Pure political offenses are those directly related to the security and structure of the state: sedition, treason, and the like. Governments and courts have had little trouble excepting these offenses from extradition. By contrast, application of the exception to "relative" political offenses has always been problematical. Relative political offenses are common, often violent crimes, such as murder and arson, whose perpetrators nevertheless claim immunity from extradition because their common, criminal acts were allegedly committed in a political context, or for a political purpose.

Claims of immunity from extradition based on "relative" political offenses have posed difficulties for civilized nations from the start. For example, in 1855, a Belgian court invoked the political offense exception to deny a French request for extradition of a fugitive who had placed a bomb under the railway over which Emperor Napoleon III was travelling. This decision led the Belgian legislature -- the land in which the exception originated -- to amend the 1833 extradition law to refuse to recognize as political offenses certain common crimes used by terrorists for political ends.

The statute provided:

There shall not be considered as a political crime or as an act connected with such a crime an attack upon the person of the head of a foreign government or of members of his family, when this attack takes the form of either murder, assassination or poisoning.

This provision, known as an "attentat clause", gained widespread acceptance as a limitation on the political offense exception.

Courts have continued to grapple with the political offense exception through the years. For example, in 1891 Britain's Queen's Bench divisional court considered a Swiss extradition request for one Castioni, a fugitive who had shot and killed a State Council member in the course of an armed attack upon a municipal building. In a landmark decision, the Justices held that a criminal act was not protected under the political offense exception if committed merely "in the course of" a political conflict or uprising; it must also be done "in furtherance of" a political cause. The court found that Castioni had acted as a participant in an insurrection, that the shooting had occurred during this conflict, and that the shooting had in fact not been an act of personal malice against the victim. The Justices therefore ruled that the offense was political and denied extradition. American courts that have recently refused extradition have relied heavily on the ruling in Castioni.

Three years after Castioni, however, the British courts refined the doctrine. The French Government requested extradition of one Meunier, who had carried out bomb attacks on a crowded cafe and an army barracks. Meunier fought extradition by invoking the political offense exception. Justice Cave held that, for an offense to be judged political, "there must be two or more parties in the State, each seeking to impose the Government of their choice on the other." Meunier, the court found, was an anarchist who was the enemy of all organized society. Accordingly, he was not subject to the exception and was ordered extradited.

While Castioni, narrowly construed, may have made sense when it was decided, it makes no sense today to deny extradition to a nation such as Switzerland -- with a democratic system of politics and a fair system of justice -- of a man who willfully attempts to impose his will on the people through murder. If civilized society is to defend

itself against terrorist violence, some offenses must fall outside the scope of the exception, even though they are politically motivated. The Meunier decision represents an early recognition that legal principles such as the political offense exception are based on the determination of sovereign nations to refuse for humane or ideological reasons to cooperate with other nations in the enforcement of criminal statutes. These principles do not create "rights" in the individuals that assert them. Each nation must decide how far to extend the doctrine based on its own values, and many have refused to shield from justice individuals who would destroy the freedoms and lives of others to gain political advantage.

A few examples should illustrate how harmful and unacceptable decisions of other nations can be, when they refuse to extradite Americans because of the political offense exception. In 1972, two American citizens, Holder and Kerkow, hijacked a domestic U.S. flight, extorted \$500,000 from the

airline that owned the plane, and forced the pilot to fly to Algeria. They were indicted in the United States for aircraft piracy, kidnapping, and extortion. The U.S. Government requested that France extradite Holder and Kerkow to this country to stand trial. Although the crimes were extraditable offenses under the U.S.-France Extradition Treaty, a French court denied extradition in 1975. The court noted that, at one point in the skyjacking, Holden had demanded that the plane be flown to Hanoi. He later dropped that demand. Nevertheless, the Court held that Holder's invocation of Hanoi demonstrated that he had acted out of a political motive, bringing the crimes within the scope of the political offense exception.

Another egregious example of overbroad application of the exception resulted from the hijacking in 1973 by five U.S. citizens of a domestic flight. They demanded, and received, \$1 million in ransom for release of the passengers, and then forced the plane to fly to Algeria. Two of the fugitives had

escaped from prison, where they had been serving sentences for murder and armed robbery. The U.S. Government sought extradition of the five from Paris in 1976 to stand trial for air piracy. But a French court refused to extradite the fugitives. It accepted their claims that they had hijacked the plane to escape racial segregation in the United States and that the charges against them constituted political persecution. The court therefore held that the skyjacking and extortion were political offenses.

In my view, some recent decisions in this country have applied the political offense exception as expansively and unreasonably as it has been applied against us by some nations. These recent decisions all concern Provisional Irish Republican Army (PIRA) fugitives, but our objections to them are based on principle and have nothing to do with the PIRA or other particular movements.

One such case involved Desmond Mackin, a PIRA member sought for the attempted murder of a British soldier. In that case, a U.S. Magistrate found that, at the time of the offense, the PIRA was conducting an armed uprising in the portion of Belfast where the crime was committed; that Mackin was an active member of the PIRA; and that the attack on the British soldier was incidental to Mackin's role in the PIRA's political uprising. The Magistrate therefore denied extradition. The decision was later upheld on appeal to the district court, and in a judgment of great significance the Second Circuit Court of Appeals refused to disturb the lower court decision, holding that the refusal of a court to grant extradition requests in certain contexts is not an appealable order.

A second case involved Joseph Patrick Doherty, who blasted his way out of a prison in Belfast while awaiting a court's decision on charges including the murder of a British Army officer. Doherty was convicted of murder and other offenses

two days after his escape and fled to the United States. The United Kingdom sought his extradition with respect to his conviction on charges of murder, attempted murder, and possession of firearms with intent to endanger life, and on new charges relating to his escape. The latter charges included firearms offenses and inflicting grievous bodily harm on a prison officer. Based upon his review of Irish history and politics, a U.S. district judge concluded that a political conflict existed in Northern Ireland and that Doherty's offenses had been committed "in the course of and in furtherance of that struggle." The judge recognized that "it would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so-called political objectives." He nevertheless drew an exception for the PIRA, after an analysis of its nature, structure, and the

mode of its internal discipline, concluding that it has "both an organization, discipline, and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade." The judge thereupon declared that Doherty's offenses were political and denied extradition.

What the PIRA and other, less structured terrorist groups have in common is far more significant in applying the political offense exception than the ways in which they may differ. All these groups exhibit a willingness to engage in the indiscriminate killing of people to achieve political ends.

Mackin and Doherty are not the only cases granting political offense treatment to PIRA members. Since 1979, U.S. judges or magistrates have denied four British requests for extradition of PIRA fugitives accused or convicted of violent terrorist crimes. Each denial was based on the political offense exception to extradition.

The problem is not the magistrates or judges involved in these cases. Their opinions reflect sincere attempts to apply our extradition laws; and the view that these lower court decisions are not always appealable has obstructed the development of law through decisions of our highest courts. The basic problem is the law itself, insofar as it is being applied so that the United States has become a sanctuary for terrorist murderers.

This is an intolerable situation. We must not allow our country to become a haven for terrorists who belong to groups that use indiscriminate violence against the citizens of other countries -- just as we expect that foreign governments should not harbor terrorists who commit violent acts against United States citizens.

Unsuccessful attempts have been made to amend our extradition statute. Those efforts differ significantly from the present one, in that they were based on changes in the

political offense exception that would or could have been applied to any nation with which we have extradition relations, including some which have experienced political change or instability since establishment of those relations, and which may not permit opponents of the government in power any lawful means of political dissent. The present approach is more narrow, and carefully drawn. It seeks to remedy the overbroad application of the political offense exception through a particular agreement with the United Kingdom. The rationale for this new Supplementary Treaty is simple: with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment. While this particular agreement relates to the United Kingdom, we fully intend to negotiate -- and are in the process of negotiating -- similar agreements with other nations that meet these criteria.

The conditions for justifying extradition of political rebels who engage in common crimes of violence undeniably exist in both the United States and the United Kingdom. Members of the Republican movement who desire reunification have not been prevented from participating in the democratic political system in the United Kingdom. Indeed, the PIRA's close supporter, Sinn Fein, has participated in a number of elections in Northern Ireland and has secured a small proportion of the vote -- just under 12 percent in the local elections held in May. A Sinn Fein member has been elected to one of Northern Ireland's 17 seats in Parliament, but has refused to take his seat. The violence is therefore not the result of a lack of opportunity to engage in the democratic process. It seems that extremists in the movement either reject the democratic system completely or are not confident of success at the polls. In any event, they conduct a campaign of violence. They have political rights, but they choose to act unlawfully.

Similarly, no one can seriously challenge the basic fairness of the British system of justice, even under the extraordinary situation that Britain has faced in Northern Ireland. To deal with that situation, the United Kingdom has developed special non-jury courts -- commonly known as Diplock Courts -- to try certain well-defined terrorist acts. Diplock Courts operate without a jury in order to eliminate the risk of jury intimidation and murders, especially likely in the trial of PIRA terrorists.

The absence of a jury does not mean the central principles of procedural fairness are not maintained: trials are held in open court; witnesses may be called and cross-examined; the burden remains on the prosecution to prove guilt beyond a reasonable doubt; the accused has a right to legal advice and representation; and the right of appeal is completely unfettered. The judge in the Doherty case recognized these facts. He found:

The Court . . . specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and could not get a fair trial in the courts of Northern Ireland. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

The Republic of Ireland also has non-jury courts for terrorist type offenses. Indeed, the Irish courts have recently decided to show their repugnance for IRA crimes by extraditing the PIRA terrorists arrested there to the United Kingdom.

Mr. Chairman, Secretary Shultz said last October that "the rule of law is congenial to action against terrorists." We and the United Kingdom view this Supplementary Treaty as an important step in applying the rule of law to terrorism. The principle reflected in Article 1 of the Supplementary Treaty will establish a definite, workable rule for applying the political offense exception to extradition among stable democracies. It will also be consistent with the rules adopted in 1977 by the Council of Europe which authored the European

Convention for the Suppression of Terrorism. That Convention established limits on the political offense exception virtually identical to those contained in this Supplementary Treaty. The United Kingdom is a party to the Convention without reservation, but it is open solely to members of the Council of Europe, and we are only an observer there. Nevertheless, in our search for a solution to the problems created by current applications of the political offense exception in U.S. courts, we looked to that Convention and concluded that its limitations were appropriate.

Mr. Chairman, I respectfully request that the Committee report on this treaty as a priority matter and that you recommend that the Senate give its advice and consent to ratification. I appreciate this opportunity to testify and will be pleased to answer any questions.

PREPARED STATEMENT OF DANTE C. SIMBULAN

Mr. Chairman and Members of the Committee:

I am Dante C. Simbulan, Executive Director of the Church Coalition for Human Rights in the Philippines. On behalf of the Coalition and the Alliance for Philippine Concerns, I would like to submit this statement opposing the approval of the 1985 Supplementary Treaty to the 1972 U.S.-U.K. Extradition Treaty.

Almost four years ago, the Church Coalition for Human Rights in the Philippines, together with all the member organizations of the Alliance for Philippine Concerns, joined in opposing the ratification of a similar extradition treaty, the U.S.-Philippine Extradition Treaty, which was submitted to the Senate for approval soon after it was signed by representatives of the U.S. and Philippine governments on November 27, 1981.

I.

The U.S.-Philippine Extradition Treaty failed to win approval owing to the vigorous opposition to its many questionable provisions. It declares that its avowed purpose is to combat "crime". Yet, the Treaty was really providing an opportunity for the Marcos regime to extend its long arm of repression to its political opponents and dissenters in the United States. While explicitly stating that political offenses are not extraditable (Art. 3, (1), its long list of extraditable offenses appearing in the Appendix include many acts which could easily fall under the political offense exception. Worse, one of its provisions grants the power of deciding what is extraditable offense to the Executive authority (i.e., Department of State in the case of the U.S.),

removing this power from the U.S. courts that results in the elimination of judicial scrutiny and curtailing due process of law.

II

We are opposed to the Supplementary Extradition Treaty between the U.S. and the U.K. (Supplement No. 99-8) for reasons analogous to those given above. The repressive machinery in operation in the Philippines, we strongly suggest, has its counterpart in Northern Ireland. The "emergency powers" of President Marcos, under Amendment No. 6 of the Marcos Constitution, which enable him to issue more than a thousand Presidential Decrees, Executive Orders, and Letters of Instructions, including the infamous Preventive Detention Action (PDA), have resulted in the arbitrary arrests and prolonged detention of tens of thousands of Filipinos who have opposed and resisted his dictatorial rule during Marcos' 20 years in power. Under these emergency powers, political activities which are considered lawful in any democracy including organizing, attending anti-government meetings or demonstrations, printing, distribution or possessing anti-government leaflets, have suddenly become serious "crimes" punishable by severe penalties. Life sentences and death, for instance, have been imposed not only on those convicted of rebellion and insurrection, but even for some non-violent opposition to the government (e.g., organizers or leaders of illegal assemblies, under Presidential Decree 1834, are meted a penalty of life imprisonment to death!)

Similar "emergency legislation" governed Northern Ireland under the British from the 1920s. After the repeal of the Special Powers Act, the Stormont Home Minister, who was always a Unionist, was conferred the power to make Regulations "for the preservation and the maintenance

of order", such as empowering himself to introduce internment and exclusion orders without trial; making it an offense to refuse to answer questions; banning organizations, meetings, processions and assemblies. These were in addition to sweeping powers of arrest and detention given the police.

The "Emergency Legislation" under which Northern Ireland is ruled by the British continued with the establishment of the Diplock Commission. Its Report which became law in August of 1973 became known as the Emergency Provisions (Northern Ireland) Act 1973 (or EPA 73). The so-called Diplock Courts were also established. These Courts abolished jury trial, allowed the use of forced confessions, the use of paid informers, and the use of searches without warrants, etc.

The Northern Ireland (Emergency Provisions) Act 1978 (or EPA 78) consolidated the previous emergency legislations. EPA(78) has many provisions similar to the Marcos decrees under Martial Law (which are still in force today). For example, the Arrest, Search and Seizure Order (or ASSO) under the Marcos regime has its counterpart in S.14 of EPA (78) which empowered a soldier to detain anyone suspected of any offense. This power, called "screening," is often used as part of the military's intelligence-gathering operations. S.13(2) EPA (78) also permits a constable without warrant to enter and search any premises and to seize anything connected with a suspected offense. The Martial Law ASSO of Marcos empowers the Philippine military and police to do exactly the same acts. Marcos' power to detain any person suspected of "subversive" activities, however, is more extensive since he can keep suspected "subversives" in detention for an indefinite period of time.

The power to declare certain groups or organizations as "sub-

versive and, therefore, illegal is present in both regimes.

Frequent military and police operations, arbitrary arrests and interrogation of suspects inevitably produce cases of torture, inhuman or degrading treatment in both the Philippine and Northern Irish situation. Task Force Detainees in the Philippines, a Church-based human rights organization reported 504 documented cases of torture in the Philippines for 1984. No separate figure for Northern Ireland are available, but the State Department's Country Reports on Human Rights gave the figure of 1,448 complaints about police conduct which were substantiated in 1983/ ^{for the U.K.} Of these, 227 resulted in disciplinary or criminal proceedings against police officers

Military and police "safehouses" and other "tactical interrogation" centers in the Philippines are often the sites where torture and Physical maltreatment of prisoners occur. In Northern Ireland, Gough Barracks and Castlereagh are often mentioned.

III

The declared purpose of the U.S.-Philippine Extradition Treaty was to combat "crime" while that of the U.S.-U.K. Supplementary Treaty, in the words of Pres. Reagan (in his letter of transmittal) is to combat "terrorism". In both cases, however, the attempt to severely curtail the "political offense" exception in extradition cases produces a situation where the distinction between criminals and terrorists on the one hand, and rebels fighting against tyranny and oppression on the other, is completely erased. The effect, in both cases, is the implied approval by the U.S. of the political status quo prevailing in the two countries. One could even go farther and interpret it as support for that country's political system (no matter how repressive), when its rebel-fugitives are surrendered upon request after they have been re-categorized as "criminals"

or "terrorists" by the Extradition Treaty.

The case of the late Philippine opposition leader, Benigno Aquino, immediately comes to mind. When the Administration was eagerly pushing for the Senate ratification of the U.S.-Philippine Extradition Treaty in 1982, the Philippine government was already preparing the ground for his possible extradition, along with scores of oppositionists-in-exile in the U.S., by filing "criminal" charges against them in Manila for "terroristic" acts of bombing and murders allegedly committed by their "co-conspirators" in the Philippines. The Marcos government, of course, did not need to extradite Aquino. He was brutally murdered the moment he set foot on Philippine soil when he voluntarily returned from exile in 1983.

Supplementary
One of our most urgent concerns about the/U.S.-U.K. Extradition Treaty involve the de facto grant of power to the Executive to decide what is an extraditable (and, therefore, non-political) offense and what is not, removing in the process the traditional authority from the U.S. Courts by simply enumerating the extraditable offenses in the Treaty itself. We urge the Committee to maintain the politically neutral character of the extradition process and to continue to provide judicial safeguards, ^{since} the fundamental rights of human beings are involved, including in many cases, perhaps even the lives of persons being subject to the extradition process. It should not be converted into a foreign policy tool where one can be "selective" in its operation, depending on the political preferences or whims of executive officials. The unreliable and unpredictable character of executive judgment, which responds more often to political expediency and foreign policy goals rather than to an independent examination of cases on their merits, can perhaps be illustrated during the period before the

submission of the U.S.-Philippine Extradition Treaty to the Senate for approval. Vice President George Bush, in what appeared to be a white-washing mission to the Philippines, heaped praises on President Marcos by publicly admiring and toasting his "adherence to democratic principles and processes", at a time when thousands of Filipino political prisoners were languishing in military jails, many of whom were tortured and detained without due process.

Finally, to the argument expressed by Abraham D. Sofaer, legal adviser of the Department of State, in his testimony before the Senate Foreign Relations Committee on August 1, 1985 that "the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment," our response is this: Any government whose authority is imposed on unwilling subjects by force cannot be expected to be neutral when the subjects question precisely its authority to govern them. Consequently, the judicial process it sets up is expected--and is primarily designed--to uphold its rule. It would not, therefore, be inclined to provide "fair treatment" to those rebels or dissidents who question its very authority.

PREPARED STATEMENT OF M. CHERIF BASSIOUNI

Professor of Law, DePaul University, since 1964; 1970 Fulbright-Hays Professor of International Criminal Law, The University of Freiburg, Germany; 1971 Visiting Professor of Law, N.Y.U.; 1972 Guest Scholar Woodrow Wilson International Center for Scholars, Washington, D.C. Since 1976 he is non-resident Dean of the International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy).

J.D., Indiana U.; LL.M., John Marshall Law School; S.J.D., George Washington University. Also studied law at Dijon University, France; The University of Geneva, Switzerland; and The University of Cairo, Egypt. In 1981 he was awarded a Doctor of Law honoris causa from the University of Torino, Italy.

Author of fifteen major books on U.S. Criminal Law and International and Comparative Criminal Law and 82 law review articles.

Active in several scholarly and professional organizations, he serves since 1974 as the Secretary-General of the International Association of Penal Law; was Chairman of the International Law Section of the Illinois State Bar for several years; chaired several committees of the Chicago Bar and American Bar Association.

A frequent lecturer at distinguished universities in the U.S. and abroad, he was a consultant to the U.N. for the Fifth U.N. Congress on Crime Prevention (1975) where he was elected Honorary Vice-President of the Congress, and also a consultant to the Sixth U.N. Congress (1980) where he presented a Draft International Criminal Code. He was also a consultant to the Division of Human Rights of the U.N. in 80-81 and prepared for it a Draft Statute for the Creation of an International Criminal Court, and a consultant to the Seventh U.N. Congress (1985), and chaired two preparatory meetings of committees of experts in 1983-84. He also served in 1978 as co-chairman of the committee of experts which prepared the U.N. Draft Convention on the Prevention and Suppression of Torture, and as chairman of the committee of experts which prepared the U.N. Draft Convention on the Prevention of Unlawful Human Experimentation. He served as a consultant to the Departments of State and Justice on projects relating to international traffic in drugs (1973) and control of terrorism (1975 and 1978-79), and as a consultant on the defense of the U.S. hostages in Iran (1979-80).

Among the distinctions and awards he received are: 1967, Outstanding Citizen of the Year of Metropolitan Chicago; 1970, Outstanding Educator of America; 1973, Men of Achievement Award (Cambridge, England); 1973, Gold Medal of the Italian Press (Rome, Italy); 1956, Order of Merit, Egypt; 1976, Order of Merit, Italy (Rank of Commendatore); 1977, Order of Merit, Italy (Rank of Grand' Ufficiale); 1984, Order of Sciences, First Class, Egypt.

He is admitted to practice in Illinois and Washington, D.C., and before the United States Supreme Court, the Second, Fifth, and Seventh Circuits of the U.S. Court of Appeals, and the United States Court of Military Appeals.

1 - Definition of Extradition

Extradition can be defined as "the legal process based on a treaty, reciprocity, comity, or national law, whereby one state delivers to another, a person charged or convicted of a criminal offense against the laws of the requesting state or in violation of international criminal law in order to be tried or punished in the requesting state with respect to the crime stated in the request." [See e.g., M.C. Bassiouni, *International Extraditions in U.S. Law and Practice* (Vol. I, Chap. 1, 1983)].

2 - Nature of the Extradition Process

Extradition is a legal process conducted by and between two or more sovereign states in accordance with international law, and the respective national laws of the involved states. It is not a political process between governments. Some governments and some writers have taken the position that it is predominantly a political process between states, involving their foreign relations, and therefore, that it is in the nature of a "contract" or "compact" between states. The implication of that conception is that the individual is only an "object" and not a "subject" of this legal process. As a consequence of this conception, the individual who is the subject of such proceedings would have no right to claim against the respective states (the requesting and the requested state) except that which each of these two states will concede. The modern view, however, is that individuals are legal subjects entitled to claim and assert rights which inure to their benefit from inter-

national law, applicable treaties, including the extradition treaty in question, and national laws including Constitutional rights. The United States has so far not squarely resolved these issues, but since the United States Constitution confers certain rights to individuals in legal proceedings which cannot be derogated, the question is moot unless a given treaty would improvidently remove or affect such rights.

3 - Legal Bases for Extradition

The legal bases for extradition are: an existing treaty, bilateral or multilateral, between the states involved, reciprocity, comity, or enabling national legislation. All of the above are subject to the Constitution and laws of the respective states. The United States relies exclusively on bilateral treaties, though nothing precludes it from relying on multilateral ones as well. It is simply a policy choice by the Executive.

In its relations with the United Kingdom the United States has relied on a number of treaties starting with Jay's Treaty of 1794 and since 1972 on The Treaty Concerning the Extradition Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, 8 June, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468, Entered Into Force, January 21, 1977.

The Supplementary Extradition Treaty of 25 June 1985 which is before the United States Senate for its "Advice and Consent" is the subject of these hearings, and of this testimony.

4 - Nature and scope of the Supplementary Treaty

The Supplementary Treaty is in the nature of an amendment and supplement to the current treaty, and is to "form an integral part of the Extradition Treaty" (Article 5, Supplementary Treaty). Its scope is as follows:

- (i) ^{Article 3 of} The Treaty in question amends and limits the scope of Article V, ^{Supplementary} Paragraph (1)(c)(i) of the ~~Current extradition~~ Treaty in that it removes from the meaning of the "political offense" exception certain crimes which as a result of the Supplementary Treaty, would make these crimes not includable within the meaning of the "political offense" exception.
- (ii) ^{Article 2 of} In addition, the Supplementary Treaty amends the ~~Current~~ Treaty, Article V, Paragraph (1)(b) with respect to the applicable "statute of limitations", as a basis for denial of extradition, making the law of the requesting state the applicable law.
- (iii) ^{Article 3 of} Also, the Supplementary Treaty amends the ~~Current~~ Treaty, Article VIII, Paragraph (2) to provide a period of 60 days, instead of the current 45 days, for "provisional arrest" pending submission by the requesting state of the necessary documents and evidence supporting the extradition request.
- (iv) ^{Article 4 of} Finally, the Supplementary Treaty provides that extradition shall be granted for any offense which constitutes a crime under the laws of both states (double criminality), irrespective of when the offense charged was committed (retroactivity

4 - Nature and scope of the Supplementary Treaty

The Supplementary Treaty is in the nature of an amendment and supplement to the current treaty, and is to "form an integral part of the Extradition Treaty" (Article 5, Supplementary Treaty). Its scope is as follows:

- (i) Article I of the Supplementary Treaty amends and limits the scope of Article V, Paragraph (1)(c)(i) of the Current Treaty in that it removes from the meaning of the "political offense" exception certain crimes which as a result of the Supplementary Treaty, would make these crimes not includable within the meaning of the "political offense" exception.
- (ii) Article II of the Supplementary Treaty amends the Current Treaty, Article V, Paragraph (1)(b) with respect to the applicable "statute of limitations", as a basis for denial of extradition, making the law of the requesting state the applicable law.
- (iii) Article 3 of the Supplementary Treaty amends the Current Treaty, Article VIII, Paragraph (2) to provide a period of 60 days, instead of the current 45 days, for "provisional arrest" pending submission by the requesting state of the necessary documents and evidence supporting the extradition request.
- (iv) Finally, Article 4 of the Supplementary Treaty provides that extradition shall be granted for any offense which constitutes a crime under the laws of both states (double criminality), irrespective of when the offense charged was committed (retro-

activity of the treaty's application) so long as it satisfies the requirement "double criminality" at the time of the commission of the alleged crime.

5 - Purposes of the Supplementary Treaty

The purposes of the Supplementary Treaty are stated in the President's Transmittal Letter to the Senate of July 17, 1985 in that "it represents a significant step in improving law enforcement cooperation and combating terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists...". The Department of State Transmittal Letter of July 3, 1985 signed by Secretary of State George Schultz reiterates that theme and states "... it therefore represents a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence." To a large extent these purposes are over-stated and their factual basis is questionable as explained below. The purposes of the Supplementary Treaty is to assist Great Britain in quelling Irish armed resistance. It is essentially an anti-IRA Treaty as explained below.

6 - Premises of the Supplementary Treaty

- (i) The stated purposes and inarticulated premises of the Treaty are misleading. The United States has had no case of "terrorism" in which it has sought a person's extradition from the U.K. under the current treaty. Thus, the Supplementary Treaty does

not, on the basis of existing and past experience, benefit the U.S., nor is it foreseeable that it won't benefit the U.S. The U.K. law and jurisprudence as the "political offense" exception (briefly described below) is adequate to protect the interests of the U.S.

- (ii) There have been no extradition cases where the U.S. was a requested or requesting state in its relations with the U.K., involving "international terrorism".
- (iii) There have been four cases decided in the U.S. involving persons who committed acts of violence in the United Kingdom and Northern Ireland who were sought for extradition by the U.K. and whose extradition was denied. They are: In re McMullen, [Magistrates Decisions No. 3-78-1099 M.G. at 3 (N.D. Calif., May 11, 1979)]; In re Mackin [Doc. S.D. 180 Cr. Misc., 47, (S.D.N.Y. Aug. 13, 1981) Government's app. dism. In re Mackin 668 F.2d.122 (2nd. Cir. 1981)]; Quinn V. Robinson [C-82-6688 R.P.A. (N.D. Cal. Oct. 3, 1983), App. sub judice, Doc. No. 83-2455 (9th Cir.)]; In re Dogherty [599 F. Supp. 270 (S.D.N.Y., Dec. 12, 1984), Government's Declaratory Judgment Petition Denied, 85 CIV. 935 - C.F.H. (S.D.N.Y. June 25, 1985).] It is because of these four cases that the Supplementary Treaty came about.
- (iv) Thus the premises supporting the purposes of the Supplementary Treaty are to facilitate extradition from the United States to the United Kingdom of persons who commit acts of violence

against the U.K. in the context of the ongoing political conflict in Northern Ireland.

- (v) The four cases decided which denied the U.K.'s extradition request were all decided under the Current Extradition Treaty and in accordance with the long standing and established jurisprudence of the U.S. on the subject of the "political offense" exception. Neither one of these cases constitutes a departure from jurisprudence in existence and application in the U.S. and in the U.K. [see, Cantrell, "The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland" 60 Marg. L. Rev. 777 (1977)]. [For the U.K. See O'Higgins "The History of Extradition in British Practice"; 6 Brit. Dig. Int'l L. 643 (1965), and V.E. Hartley-Booth, British Extradition Law and Procedure (1980) P. 73-88, wherein the landmark case Re Castioni 1 Q.B. 149 (1891) was cited as the foundation of the British doctrine of the "political offense" exception, later expanded by the cases discussed below. The U.S. position was based on Castioni and the jurisprudence of U.S. Courts has been substantially consistent since the adoption of the doctrine, see G.M. Whiteman, Digest of International Law (1968) PP. 799-856.]
- (vi) So far, there has been no variance between the decisions of the U.S., and those of the U.K., on the interpretation and application of the "political offense" exception, though no such cases arose in which the U.S. was the requesting state.

(vii) Nothing in the jurisprudence of the U.S. Courts could lead to believe that wanton violence would benefit from the "political offense" exceptions [see, Eain V. Wilke 641 F.2d.504 (7th Cir. 1981), Cert. denied 454 U.S. 894 (1981), See also, Banoff and Pyle "To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law" 16 J. Int'l L. & Pol. 169 (1984)].

7 - Exclusions from the "political offense" exception in the Supplementary Treaty

The exclusions which are contained in Article I of the Supplementary Treaty should be divided into two categories:

"international crimes" and "ordinary crimes of violence."

- A. Paragraphs (a)(b)(c)(d) cover "international crimes" with respect to which the applicable international criminal law conventions provide for the alternative duty to prosecute or extradite [see M.C. Bassiouni, International Crimes: Digest/ Index of Conventions & Relevant Penal Provisions (2 vols. 1985, Oceana Publ., Dobbs Ferry, N.Y.)]. Thus, these provisions of the Supplementary Treaty are in conformity with the international legal obligation of the United States and of the United Kingdom, to the extent that they have ratified the relevant conventions. But the formulation of these exclusions in the Supplementary Treaty are more restrictive than their counterpart in the relevant conventions because the Supplementary Treaty obligates unconditionally the parties to extradition whereas the

relevant conventions provide for the alternative right to prosecuting instead of extraditing.

- B. Paragraphs (e) through (l), "ordinary crimes of violence" are not supported by any international duty to extradite, whether it be based on conventional or customary international law. They are ordinary crimes of violence which when linked to an actor's political motives and goals have usually been regarded (with differing national legal criteria and standards) as non-extraditable under the "political offense" exception doctrine.

Such exclusions constitute a departure of existing precedents in the United States and in the United Kingdom. They remove any possible judicial consideration of the applicability of the "political offense" exception for any of the acts of violence enumerated no matter how slight, or what its purposes may be, and however justifiable it may have been under the circumstances.

8 - Article I Exclusions in the Supplementary Treaty under United Kingdom Extradition Law

The two categories of Article I exclusions should be examined separately.

- A. The first category, "international crimes" [(a) through (d)] is in keeping with the relevant international criminal law conventions signed by the United Kingdom, and embodied in certain statutory enactments. These are: The 1970 Hague Convention is embodied in the Hijacking Act of 1971; The 1971

Montreal Convention on aircraft sabotage is embodied in the Protection of Aircraft Act of 1973; The 1974 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons is embodied in Internationally Protected Persons Act of 1978. The United Kingdom is also a signatory to the 1977 European Convention on the Suppression of Terrorism (E.T.S. No. 90)* which excludes from the "political offense" exception those "international crimes" in the category of excludable crimes under Article I of the Supplementary Treaty.

The U.K. in order to implement these various treaty obligations in its extradition law passed the Suppression of Terrorism Act of 1978 (the Act does not however define "terrorism")** which amends Section 3 of the Extradition Act of 1870 (previously amended by the Acts of 1965 and 1967) which is the basic extradition statute of the United Kingdom applicable to extradition with non-commonwealth states. Nevertheless, should the U.K. wish to prosecute persons sought through extradition by a requesting state as an alternative to

* As of June 1985 States that have ratified the Convention: Austria, Cyprus, Denmark, F.R. Germany, Ireland, Liechtenstein, Luxembourg, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom. N.B. Some states have ratified with reservations. States that have not ratified the Convention: Belgium, France, Greece, Ireland, Italy, Malta, Netherlands, Finland, [Israel, Canada, and the United States who can accede to European Conventions have not signed or ratified].

** See e.g. M.C. Bassiouni, International Terrorism and Political Crimes (Charles C. Means Pub., Springfield, Ill. 1975), and R. Friedlander Terrorism: Documents of International and Local Control (Vols. I & II 1979) (Vol. III 1981).

their surrender, it can do so through the use of "executive discretion" exercised by the Secretary of State. Presumably such discretion would still lie even if the Supplementary Treaty would enter into force after the U.K. would enact the appropriate national legislation; however that is not clear in the language of the Supplementary Treaty.

- B. The second category, "ordinary crimes of violence" [(e) through (1)], is contrary to existing U.K. law and practice on non-extradition based on "political offense" exception grounds. [Re Castioni [1891] 7 Q.B. 149, (expanded subsequently) Re Mevnier [1894] 2 Q.B. 415 to the later landmark cases of R.V. Governor Brixton Prison ex parte Kolczynski [1955], Schtracks V. Government of Israel [1964] A.C. 556 Cheng V. Governor of Pentonville Prison [1973] A.C. 931 R.V. Governor of Pentonville Prison ex parte T2U-TSAI [1975] 7 W.L.R. 893.] See also Hartley-Booth, Supra, and J. Stephen, History of Criminal Law of England (Vol 2, 1883) P. 71 Wherein he states: "... fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and form part of political disturbances" (emphasis added). The cases cited Supra are in keeping with this basic postulate of English extradition law and practice.] Nothing of course precludes the U.K. from entering into a treaty with a foreign state to change that position. But it would have to embody the provisions of such a treaty unto a new statute in accordance with statutory enactment requirements.

That would in effect limit the applicability of the current extradition law, its interpretation and application.

9 - Article I Exclusions in the Supplementary Treaty under U.S. Law

On its face nothing precludes the U.S. from entering into a treaty which limits the rights of individuals in extradition proceedings provided however that such limitations are not contrary to the Constitution of the United States. Thus the first question is whether Article I exclusions are, or could be deemed to be in violation of the Constitution. In this respect Article I exclusions should be examined under its two separate categories: "international crimes" and "ordinary crimes of violence".

- A. The first category of exclusions, "international crimes", does not constitute a violation of any Constitutional provision. It does not however add anything more to the existing international legal obligations of the United States under the relevant international conventions on aircraft hijacking and sabotage, and on kidnapping of diplomats and taking of hostages which the United States has already ratified. These treaty obligations are also embodied in title 18 of the United States Code and the various prohibited acts constitute a federal crime. Thus, such crimes if charged in an extradition request by any state (with which the U.S. has an extradition treaty. Even without a bilateral extradition treaty, these four multilateral conventions constitute an adequate legal basis for extradition), a U.S. Court could reject the defense of the

"political offense" exception on the grounds that international crimes are excluded from the exception save for "extraordinary circumstances" [see Extradition Reform Act of 1981, S. 1940, 9th. Cong., 2d. Sess. Sec. 3194 (e)(2) (discussed below).]

B. The second category of exclusions, "ordinary crimes of violence", constitutes, in the opinion of this witness, a violation of the Constitution on several grounds; they are:

- i) a violation of the "equal protection" clause of the Fifth Amendment; and
- ii) a violation of the supremacy of international law under the Constitution.

(i) With respect to the "equal protection" violation, it is apparent on the face of this category of exclusions, that it is aimed exclusively at those persons who are charged with committing such violations under U.K. law. The same exclusions do not apply to other persons who commit the same acts in other states with which the U.S. has extradition treaties and who would still continue to benefit from the "political offense" exception. In other words the same acts of violence would not be part of the "political offense" exception if the requesting state was the U.K., but they would be if it is any of the 100 other states with which the U.S. has extradition relations. One is tempted in this regard to remark that since the acts in question have not so far involved the U.S. as a requesting state, and have exclusively involved Irish persons engaged in

armed rebellion against the U.K. that these exclusions can be referred to as the "IRA exclusions". Thus this may also raise an issue of unconstitutional discrimination on the basis of race and political conviction. The witness does not represent himself as a Constitutional law expert, and thus the issues raised herein should be further explored with appropriate experts. Such discrimination, if it is so deemed, would also constitute a violation of another U.S. treaty obligation, namely the 1967 Protocol Amending the 1951 Refugee Convention which the U.S. has ratified and which is indeed embodied in the U.S. Immigration and Nationality Act, under the 1980 Refugee Act, 8 U.S.C. Section 1653, 243(h).

- (ii) The Constitution, while not containing a specific reference to the applicability and supremacy of international law, implies it in the various provisions conferring upon Congress certain powers "to define and punish offenses against the Law of Nations" (Article I Section 8), and with those references concerning Ambassadors, Treaties, War and other international acts and relations [See L. Henkin, Foreign Affairs and the Constitution, (1972) 127]. As stated by the first Chief Justice, (who was also the drafter of the first extradition treaty with the U.K.), John Jay in Gibbons v. Ogden, 9 Wheat. 7,228(U.S.1824) "by taking a place among the nations of the earth [the U.S. became] amenable to the law of nations" (emphasis added). Thus the U.S. is subject to international law

and cannot derogate to it by statute or by a bilateral treaty.

These exclusions are contrary to customary international law (with respect to the "political offense" exception). Customary international is part of international law [Article 38, Statute of the International Court of Justice, Charter of the United Nations, ratified by the United States; see also A. D'Amato, The Concept of Custom in International Law (1969), and M. Whiteman, Digest of International Law (1968).]

At present every legal system with the same general characteristics as that of the U.S., or with equivalent concepts and practices of fairness and due process allow in some respects the "political offense" exception to include the offenses specifically and unconditionally excluded in these provisions of Article I [See C. Van den Wijngaert, The Political Offense Exception to Extradition (1980, Kluwer, the Netherlands) citing cases from over twenty countries and writings of scholars from over thirty countries. The same views are reflected in M.C. Bassiouni, International Extradition in United States Law and Practice (Vol II, Chapter VII, pp. 1-108, 1983) See also, S. Bedi, Extradition in International Law and Practice (1968), I. Shearer, Extradition in International Law (1977), and for earlier seminal works, see A. Billot, Traite de L'Extradition (1874), J. B. Moore, A Treatise on Extradition and Inter-State Rendition (2 Vols. 1891) and E. Clarke, A Treatise up the Law of Extradition (4th Ed. 1903)].

These exclusions unconditionally remove the enumerated acts of violence from the "political offense" exception, irrespective of their nature, intensity, the harm they produced, the motives and goals of the actor, the circumstances that may have compelled the actor to commit such acts. They are therefore contrary to customary international law (which permits their subjects to certain conditions) and as such they are protected by the Constitution which makes international law part of the "supreme law of the land" that cannot be derogated by treaty [Henkin, supra]. To permit a bilateral treaty to derogate international law would be tantamount to allowing the Senate to amend the Constitution.

10 - The Antecedents of Article I Exclusions

The exclusions contained in Article I are similar to the ones contained in the 1981 Extradition Reform Act, (and its subsequently amended versions) submitted to the Senate and House and of which no version was passed essentially because of Congressional opposition to the formulation of the "political offense" exception and the exclusions therefrom. As a witness before four Committees of the Senate and House, this witness presented views on the improvements deemed necessary to make these provisions fair and wise, and subsequently embodied these views in Bassiouni "Extradition Reform Legislation in the United States: 1981-1983" 17 Akron L. Rev. 495-574 (1984), of which relevant excerpts from pp. 547-553 follow:

1. The Political Offense Exception

The political offense exception was the most extensively debated issue at congressional hearings on all the proposed bills.¹³⁹ Both versions define the

¹³⁹See S. 220, *supra* note 7, § 3194(e); S. 1940, *supra* note 5, § 3194(e); S. 1639, *supra* note 1, § 3194(e); H.R. 3347, *supra* note 8, § 3194(e); H.R. 2643, *supra* note 8, § 3194(e); H.R. 6046, *supra* note 5, § 3194(e); H.R. 5227, *supra* note 2, § 3194(e).

¹⁴⁰See S. 220, *supra* note 7, § 3194(d)(3); S. 1940, *supra* note 5, § 3194(d)(3); S. 1639, *supra* note 1, § 3194(d)(3); H.R. 3347, *supra* note 8, § 3194(d)(2)(B); H.R. 2643, *supra* note 8, § 3194(d)(2)(B); H.R. 6046, *supra* note 5, § 3194(d)(2)(B); H.R. 5227, *supra* note 2, § 3194(d)(2)(B).

¹⁴¹See H.R. 3347, *supra* note 8, § 3194(d)(2)(A); H.R. 2643, *supra* note 8, § 3194(d)(2)(A); H.R. 6046, *supra* note 5, § 3194(d)(2)(A); H.R. 5227, *supra* note 2, § 3194(d)(2)(A). H.R. 3347 also provides for the defenses of (1) "prosecution or punishment because of . . . race, religion, sex, nationality, membership in a particular social group or political opinion," and (2) "fundamental unfairness" as a result of extradition. H.R. 3347, *supra* note 8, § 3194(d)(2)(D). The bill further states:

The Government shall disclose to the court any information in the possession of the Government that would tend to establish the validity of a defense against extradition, unless such disclosure is prohibited by law.

H.R. 3347, *supra* note 8, § 3194(e)(1)(C).

¹⁴²See generally 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 1.

¹⁴³See *id.* at ch. V, § 1. See also *David v. United States*, 699 F.2d 41; *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *United States v. Lovato*, 520 F.2d 1970; *Watts v. McGowan*, 516 F.2d 203 (3d Cir. 1975); *United States v. Lira*, 515 F.2d 68 (2d Cir., *cert. denied*, 423 U.S. 847 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974); *United States v. Toscanino*, 500 F.2d 267.

¹⁴⁴See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 2 (testimony of M. Abbell, Dep't of Justice); *id.* at 8 (testimony of D. McGovern, Dep't of State); *id.* at 20 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 29 (testimony of W. Hannay); *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 25 (testimony of R. Olsen and M. Abbell, Dep't of Justice); *id.* at 31 (testimony of D. McGovern, Dep't of State); *id.* at 49 (testimony of D. Cartimer, International Human Rights Law Group); *id.* at 64 (testimony of R. Falk, Princeton University School of Law); *id.* at 71 (testimony of W. Henderson, ACLU); *id.* at 85 (testimony of W. Goodman, Topel & Goodman); *id.* at 98 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 108 (testimony of S. Lubet, Northwestern University School of Law); *id.* at 141 (testimony of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for Philippine Concerns); *id.* at 209 (prepared statement of C. Pyle, Mount Holyoke College); *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 26. The Senate Judiciary Committee version of S. 1940 placed the political offense exception outside the jurisdiction of the federal court. Instead, it gave the Secretary of State the authority to determine the applicability of the exception. It also established criteria by which this determination was to be made, and provided for appeal of the Secretary's decision, such appeal to be successful if the federal court found that the Secretary's decision was not based on substantial evidence. See *Senate Judiciary Report on S. 1940*, *supra* note 14, at 33-36. The Senate Foreign Relations Committee amended S. 1940 by placing the exception under the jurisdiction of the federal courts, and establishing criteria by which the court's determination is to be made. See *Senate Foreign Relations Report on S. 1940*, *supra* note 20, at 19-20.

political offense exception by listing those acts which cannot be considered a political offense. In both the Senate and House bills, the following offenses may *not* be considered political offenses:

(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

(F) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.¹⁰⁰

The offense of rape may not be considered a political offense under any circumstances in the Senate bill. Under the House bill, however, rape may be

¹⁰⁰S. 220, *supra* note 7, § 3194(e)(1)(A)-(E), 3194(e)(1)(G); S. 1940, *supra* note 5, § 3194(e)(1)(A)-(E), 3194(e)(1)(G); H.R. 2643, *supra* note 8, § 3194(e)(2). The prior House bill, H.R. 6046, provided that these offenses could be deemed "political offenses" in "extraordinary circumstances." See H.R. 6046, *supra* note 5, § 3194(e)(2)(A)-(D), 3194(e)(2)(G), 3194(3)(2)(H). In addition, this prior bill stated that an offense could not be deemed a political offense if it were "an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense," *id.* § 3194(e)(2)(D) (emphasis added), rather than requiring that such duty to prosecute or extradite be included in a multilateral treaty, as both Senate bills and the subsequent House bill provide. See S. 220, *supra* note 7, § 3194(e)(1)(D); S. 1940, *supra* note 5, § 3194(e)(1)(D); H.R. 2643, *supra* note 8, § 3194(e)(2)(D).

The original House bill, H.R. 5227, stated that these crimes would not *normally* be considered political offenses. H.R. 5227, *supra* note 2, § 3194(e)(2)(B). The original Senate bill, S. 1639, did not include a listing of crimes outside the definition of the "political offense exception," since under this bill the entire issue was outside the court's jurisdiction. See S. 1639, *supra* note 1, § 3194(a).

H.R. 3347 provides that the last four offenses listed above cannot be deemed political offenses. In addition, the bill states that "forcible sexual assault" is not a political offense, as well as "an offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities." H.R. 3347, *supra* note 8, § 3194(e)(2). Moreover, the bill deletes the distinction between those offenses which could never be considered political offenses and those which could be so deemed under "extraordinary circumstances." Instead, the bill provides in subsection (3):

The inclusion in paragraph (2) of this subsection of certain offenses does not preclude the exclusion of other offenses from the political offense category. In determining whether an offense is a political offense the court shall consider, as of the time of the offense —

(A) the status (whether civilian, governmental, or military) of any victims of the alleged offense;
(B) the relationship of the alleged offender to a political organization;
(C) the existence of a civil uprising, rebellion, widespread civil unrest, or insurrection within the State requesting extradition;
(D) the motive of the alleged offender for the conduct alleged to constitute the offense;
(E) the nexus of such alleged conduct to the goals of a political organization; and
(F) the seriousness of the offense.

considered a political offense in extraordinary circumstances.¹⁰¹ Both versions of the Act provide that the following conduct may be considered a political offense in extraordinary circumstances: "(1) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or serious unlawful detention; (2) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender; (3) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense."¹⁰²

By defining the political offense exception through examples rather than through generic definitions, both versions may force the courts into a difficult position due to insufficient flexibility in determining the validity of the relator's political motives in committing the offense. Instead, the Act should define the purely political offense as a general defense and the relative political offense as a qualified defense, with the exclusion of international crimes except for exceptional circumstances as the House version did.¹⁰³

A purely political offense is still a defense under the Act, but only by implication. The offense itself is labelled a crime because it constitutes a subjective threat to the state's political, religious or racial ideology or its supporting structure, or both.¹⁰⁴ The offense has none of the elements of a common crime, where a private wrong has been committed through the injury to private persons, property or interests. Treason, sedition, and espionage are offenses directed against the state itself and are, therefore by definition, a threat to the state's existence, welfare, and security. If such an act is linked to a common crime, however, it loses its purely political character and no longer benefits from the defense.

In contrast the relative political offense¹⁰⁵ is almost entirely eliminated in the Senate version because it contains an element of violence which creates a private wrong. The relative political offense can be an extension of the purely political offense, or it can be a common crime prompted by ideological motives.

¹⁰¹S. 220, *supra* note 7, § 3194(e)(1)(F); H.R. 2643, *supra* note 8, § 3194(e)(3)(C); H.R. 6046, *supra* note 5, § 3194(e)(2)(E); H.R. 5227, *supra* note 2, § 3194(e)(2)(E). H.R. 3347 states that "forcible sexual assault" may not be deemed a political offense, subject to the factors of subsection (3). See *supra* note 300. S. 1940, similar to H.R. 6046, provided that the offense of rape could be considered a political offense in extraordinary circumstances. See S. 1940, *supra* note 5, § 3194(e)(2)(A).

¹⁰²S. 220, *supra* note 7, § 3194(e); S. 1940, *supra* note 5, § 3194(e); H.R. 2643, *supra* note 8, § 3194(e)(3); H.R. 6046, *supra* note 5, § 3194(e)(2)(E), (F), (H); H.R. 5227, *supra* note 2, § 3194(e)(2)(E), (F), (H). H.R. 3347 does not make the distinction between those offenses which may be considered political in exceptional circumstances. See *supra* note 300.

¹⁰³This position was advocated by this writer at Congressional hearings on the Act. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 20; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 105-106; *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 27. See also 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 2, pp. 1-106; VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION, *supra* note 39. H.R. 3347 approximates this approach more than previous versions of the Act. See *supra* note 300.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

In determining whether an act constitutes a relative political offense, four factors should be taken into account: (1) the degree of the actor's political involvement in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause on behalf of which he has acted, and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed above) and the crime committed; (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal, or objective to be served; and (4) whether the relator's political motives and goals predominate over his intention to commit the common crime.¹⁰⁶ These criteria embody the jurisprudence of the United States on the political offense exception,¹⁰⁷ but both the Senate and House versions seem to ignore the need for simplicity, clarity, and preservation of basic human rights, protections which, when abused, may leave the individual no other recourse than to engage in an act of violence and thus be extraditable.

International crimes are the exception to the political offense exception they are extraditable offenses which are not to benefit from the political offense exception.¹⁰⁸ But the question still arises as to whether or not there are some "exceptional circumstances" (as the House version describes it) which would warrant exclusion. International crimes are offenses against the Law of Nations or *delicti jus gentium* and by their very nature affect the world community as a whole. As such, they should fall within the political offense exception because, even though they may be politically connected, they are in derogation to international law.¹⁰⁹

International crimes are those declared to be so, explicitly or implicitly, in multilateral international conventions. At present these crimes are: aggression, war crimes, unlawful use of weapons, genocide, crimes against humanity, *apartheid*, crimes relating to international air communications, threat and use of force against internationally protected persons, taking of hostages, unlawful use of the mails, drug offenses, falsification and counterfeiting, theft of national and archaeological treasures, bribery of foreign public officials, interference with submarine cables, and international traffic in obscene publications.¹¹⁰ Theoretically, international crimes are excluded from the political offense exception irrespective of the circumstances under which they occurred, but it certainly can be conceived that under certain circumstances they could be subject to some special consideration. One such example is where an individual is persecuted for political, racial or religious reasons and his life or liberty is in

¹⁰⁶See *Eain v. Wilkes*, 641 F.2d 504. See also H.R. 3347, *supra* note 300.

¹⁰⁷See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 2, pp. 1-19.

¹⁰⁸See *supra* note 303.

¹⁰⁹*Id.* See also Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

¹¹⁰See BASSIOUNI, INTERNATIONAL CRIMINAL CODE, *supra* note 12, at 52-106.

serious jeopardy, and such individual by seeking to escape commandeers an aircraft without causing risk or harm to others. Should that type of situation, which could technically be labelled hijacking, receive some consideration excluding it from the exception to the exception? The Senate version makes no such consideration, while the House version does.

History teaches us that certain regimes at times create conditions which are so depravatory of minimum standards of human rights that a person subjected to such conditions has no alternative but to seek redress or even escape by means of some violent conduct. Under the legislation, such persons subjected to these conditions would not benefit from the political offense exception and would be returned to the requesting state where they are likely to be subjected to prosecution.

Only those international crimes embodied in treaties ratified by the United States come under this category in the Act. In addition, both bills provide that except in extraordinary circumstances, a violent act shall not constitute a political offense if it is "an offense with respect to which a treaty obligated the United States to either extradite or prosecute a person accused of the offense." The offense of war crimes — i.e., grave breaches of the Geneva Conventions of August 12, 1949¹¹¹ — are not included in the enumerated exceptions, but should have been. Such offenses could be interpreted as within the ambit of this subsection, because the United States is a party to the Geneva Conventions, which obligate the United States to prosecute or extradite individuals who have committed grave breaches of the Conventions. To avoid unnecessary ambiguity, a specific statement should have been made to exclude such violations, namely: "grave breaches of the Geneva Conventions of August 12, 1949 and any amendments thereto to which the United States may become a party."¹¹²

Prescinding from certain aspects of the customary law of armed conflicts,¹¹³

¹¹¹Geneva Conventions of August 12, 1949:

- No. I. For the Amelioration of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31;
- No. II. For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85;
- No. III. Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135;
- No. IV. Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

¹¹²The reference to "amendments to the Geneva Conventions" is to provide for the United States' eventual ratification of the Protocols Additional to the Geneva Conventions of August 12, 1949, June 10, 1977, U.N. Doc. A/32/144 (1977).

¹¹³Hague Conventions of October 18, 1907: Convention (I) for the Pacific Settlement of International Disputes, 3 Martens Nouveau Recueil (3d) 340, 36 Stat. 2199, T.S. No. 536; Convention (II) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 3 Martens Nouveau Recueil (3d) 414, 36 Stat. 2241, T.S. No. 537; Convention (III) relative to the Opening of Hostilities, 3 Martens Nouveau Recueil (3d) 437, 36 Stat. 2259, T.S. No. 538; Convention (IV) respecting the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (3d) 461, 36 Stat. 2277, T.S. No. 539; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 3 Martens Nouveau Recueil (3d) 504, 36 Stat. 2310, T.S. No. 540; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 3 Martens Nouveau Recueil (3d) 533; Convention (VII) relating to the

the Geneva Conventions of August 12, 1949 differentiate between various levels of hostilities and distinguish between two general types of hostilities: international armed conflicts, and non-international armed conflicts (i.e., internal conflicts).¹

Under the Conventions, acts of violence committed in the context of international armed conflicts cannot be considered political crimes for which extradition may be denied through the application of the political offense exception. Instead, violent acts in this context are either justified and therefore not criminal, or they are unjustifiable and are grave breaches or war crimes for which extradition or prosecution is required. Whether the violent act is to be deemed a crime depends on whether the act violated the terms of the Geneva Conventions. If the act of violence conforms to the requirements of the Conventions, it is not a crime. Thus, extradition of an individual who has committed such an act cannot be granted because it is justifiable under international law and, therefore, could not be a crime under United States law, so the requirement of dual criminality, section 3194, would not be fulfilled.

Acts of violence which are committed in the contexts of internal conflict, on the other hand, may be considered within the scope of the political offense exception. These contexts include internal armed conflicts and internal civil strife.

Acts of violence committed in the context of internal armed conflicts are regulated by Common Article 3 of the Geneva Conventions. This article prohibits acts such as killing, torturing, or taking hostage individuals who are not actively engaged in the armed conflict such as the wounded, sick, shipwrecked, and civilians. Article 3 does not provide that such acts are to be considered criminal acts, nor does it provide that other acts of violence are to be deemed justifiable. Instead, it leaves this determination to states' application of their national criminal laws and to their definitions of the political offense exception in extradition treaties.¹¹⁴ Thus, the political offense exception becomes relevant when an act of violence which does not violate Article 3 has been committed. Because the United States is a party to the Geneva Conventions, the Act should have been drafted so that it was consistent with these Conventions.

Conversion of Merchant Ships into War-Ships, 3 Martens Nouveau Recueil (3d) 557; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 3 Martens Nouveau Recueil (3d) 580, 36 Stat. 2332, T.S. No. 541; Convention (IX) concerning Bombardment by Naval Forces in Time of War, 3 Martens Nouveau Recueil (3d) 604, 36 Stat. 2351, T.S. No. 542; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1907, 3 Martens Nouveau Recueil (3d) 630, 36 Stat. 2371, T.S. No. 543; Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 3 Martens Nouveau Recueil (3d) 663, 36 Stat. 2396, T.S. No. 544; Convention (XII) relative to the Creation of an International Prize Court, 3 Martens Nouveau Recueil (3d) 688; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 3 Martens Nouveau Recueil (3d) 713, 36 Stat. 2415, T.S. No. 545; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 3 Martens Nouveau Recueil (3d) 745, 36 Stat. 2439, T.S. No. 546.

¹¹⁴See, e.g., Veuthey, *Some Problems of Humanitarian Law in Non-International Conflicts and Guerrilla Warfare*, in 1 BASSIOUNI & NANDA, *INTERNATIONAL CRIMINAL LAW*, *supra* note 12, at 422; Veuthey, *Les Conflicts Armes de Caractere Non International et le Droit Humanitaire*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW* 179 (E. Cassese ed. 1973).

It should provide that extraordinary circumstances include those situations wherein an act of violence has been committed in the course of an internal armed conflict, as provided under Common Article 3 to the Geneva Conventions of August 12, 1949, and is deemed permissible under the terms of these Conventions.

Acts of violence which are committed during periods of civil strife are not regulated by the Geneva Conventions. Instead, they are regulated solely by national criminal laws and are therefore subject to the existing meaning of the section's exceptions to the political offense exception. Thus, the Act's treatment of the political offense exception is inadequate. The Senate version provides for the purely political offense exception only by implication, and eliminates entirely the relative political offense when connected with a crime of violence. This is, with the exception of totalitarian regimes, one of the most restrictive legislative formulations in the world,¹¹⁰ and was severely criticized by almost every witness before the Senate¹¹¹ and House¹¹² except for government representatives,¹¹³ and, of course those witnesses suggested by them.¹¹⁴ As to international crimes, they too are entirely excluded from consideration as a political offense exception in the Senate version and the later House version, but included in the House version under the condition that it be due to extraordinary circumstances.¹¹⁵ The House bill does not define "extraordinary circumstances," leaving the definition open for future jurisprudential development which, by examining the House legislative interpretation, would not change existing judicial standards.¹¹⁶

¹¹⁰*Id.* On the "relative political offense" exception generally, see VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION*, *supra* note 39, at 108-11.

¹¹¹See *Senate Foreign Relations Hearings on S. 1940*, *supra* note 20.

¹¹²See *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 49 (testimony of D. Carliner, International Human Rights Law Group); *id.* at 64 (testimony of R. Falk, Princeton University School of Law); *id.* at 71 (testimony of W. Henderson, ACLU); *id.* at 85 (testimony of W. Goodman, Topel & Goodman); *id.* at 98 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 108 (testimony of S. Lubet, Northwestern University School of Law); *id.* at 141 (testimony of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for Philippine Concerns); *id.* at 209 (prepared statement of C. Pyle, Mount Holyoke College); *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 26.

¹¹³See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 2, 4, 8, 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 26-27 (testimony of R. Olsen and M. Abbell, Dep't of Justice); *id.* at 32 (testimony of D. McGovern, Dep't of State).

¹¹⁴See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 30 (testimony of William J. Hannay).

¹¹⁵See *supra* note 300.

¹¹⁶See *House Judiciary Report on H.R. 6046*, *supra* note 22, at 23-27.

11 - The Wisdom of Article I Exclusions

- (i) The category of "international crimes" exclusion (a) to (1) does not need to be embodied in a bilateral extradition treaty with a given country, albeit a friendly ally, because these crimes are already subject to U.S. international legal obligations under the relevant conventions, and are part of federal criminal law. They would be deemed excludable from the "political offense" exception, as an "exception to the exception", unless the U.S. elects to prosecute that person as an alternative to extradition, or the President decides to use "executive discretion" to deny surrender of the person, or if judicial discretion finds "extraordinary circumstances" (a term used in the 1981 Extradition Reform Act) to warrant, justify or sufficiently mitigate the commission of the prohibited acts and deny extradition (on the criteria for such a judicial determination, see Bassiouni, "Ideologically Motivated Offenses and the Political Offense Exception in Extradition -- A Proposed Judicial Standard for an Unruly Problem", 19 DePaul L. Rev. 217 (1970). The historical experience of the law is that harsh laws make bad law and that is evident in this instance.
- (ii) The second category "ordinary crimes of violence" need not be singled out in a given extradition treaty with a given state to the exclusion of other treaties and contrary to customary international law and to the law and practice of the United States almost 200 years [see in re Robbins, 27 F. Cas.825

(No. 16,175) (D.S.L. 1799). It is ironic that the first extradition statute passed in the U.S. in 1848 was in response to the Robbins case whereby the President improvidently ordered a person surrendered to Britain. The Statute was to curb Presidential power and to make extradition a judicial and not a political determination, See Bassiouni, Akron L. Rev. Supra]. As stated by this witness before four Committees of the Senate and House in connection with the 1981 Extradition Reform Act, the proposition that the U.S. may become a "haven for terrorists" (as advanced by Administration proponents of the said Act) is simply preposterous [See, Senate Judiciary Hearings on S. 1639, The Extradition Reform Act of 1981, and Bassiouni, "Extradition Reform Legislation in the United States: 1981-1983," (7 Akron L. Rev. 495, at 501 (1984))]. In the last thirty years "political offense" exception has been raised no more than two dozen times and only in four cases (cited supra) has it been granted. [For support as to the historical jurisprudence of the U.S., but somewhat critical of the doctrine in some of its applications, see, Carbonnear "The Political Offense Exception to Extradition and Transnational Terrorists", 1 A.S.I.L.S. Int'l L. J. 1 (1977), Hannay, "International Terrorism and the Political Offense Exception to Extradition", 18 Colum. J. Transnat'l L. 381 (1979), and Lubet and Czackes, "The Role of the American Judiciary in the Extradition of Political Terrorists", 71 J. Crim. L. & Criminology 193 (1980).]

- (iii) To attempt by a special Treaty with a given state to preclude U.S. Courts from validly exercising their judicial prerogatives so judiciously exercised over a period of almost 200 years [See, Eain V. Wilkes, 641 F.2d. 509(7th Cir. 1981), Cert. denied 454 U.S. 894 (1981)] is not only unwise but would be an unconscionable statement of lack of confidence in the judiciary. Judicial determination has always been found preferable to ad hoc political judgments responsive to passing political circumstances.
- (iv) Finally, should the U.S. decide to alter its historical jurisprudential course of almost 200 years by expanding exclusions to the "political offense" exception, it is more appropriately done through legislation, than through ad hoc treaties, which imply special relationships with some countries to the exclusion of others. Such a precedent would open the floodgates for amending or supplementing treaties on extradition that the U.S. has with some 100 countries without providing any consistent policy and application for a legal process that requires both. The Senate should be mindful of this consideration, which is supported by the experience of the Senate and House with similar concepts that were embodied in the 1981 Extradition Reform Act and which have not reached fruition precisely because of the many aspects of the problem inherent to the "political offense" exception.
- (v) Lastly, ratification of this Supplementary would not only reverse a historical trend in the U.S. which since the 1860's

rebellion of Irish resisters to British rule in Ireland, and now Northern Ireland has never surrendered any Irish political resister to Great Britain. Such a reversal in the terms proposed in the Supplementary Treaty would only mean that the U.S. has taken sides in an internal political civil conflict which it had carefully avoided to in the past. Such a policy of neutrality in internal civil strife would be wise in light of the many ongoing civil conflicts all over the world. To do otherwise would place the U.S. in a difficult position with respect to other countries seeking similar favorable treatment. Short of finding itself embroiled in all sorts of difficult situations with a large number of countries in the world and of becoming, indirectly, a party to internal civil strife, the U.S. should continue its historical neutrality.

12 - Article I Exclusions in the Supplementary Treaty and Special Laws of the United Kingdom

This witness does not profess to have any expertise in the administration of justice in the United Kingdom and Northern Ireland, but draws the Committee's attention to existence of emergency legislation with respect to the conflict in Northern Ireland, which may cast doubt as to the "due process" aspects of the administration of criminal justice as applied to Irish resisters in Northern Ireland and in Britain, and their treatment in prisons which has been condemned by the European Court of Human Rights as a violation of the 1950 European Convention on Human Rights and Fundamental Freedoms

(1951). [(213 U.N.T.S. 221), See i.e., the cases of Ireland V. United Kingdom, and Hilton V. United Kingdom].

The ratification of this Supplementary Treaty raises questions about this aspect of U.K. administration of criminal justice and detentional policies and practices that the Committee should explore more carefully.

13 - The Supplementary Treaty's Provisions on Provisional Arrest

Article 3 extends the already lengthy period of provisional arrest of the Current Treaty (Article VIII, paragraph (2) from 45 to 60 days. Such a provisional arrest can and does occur solely on the basis of a simple Telex. During this period of time a person detained is seldom if ever admitted to bail, and has no means of securing release, since the charges by the requesting state are not even available to the U.S. government. Such a person would linger in detention without an opportunity to present a defense, or even prepare a defense, and it is tantamount to a reversal of the "presumption of innocence" without the "due process" of the law as guaranteed by the Fifth Amendment to the Constitution.

The period of 45 days of provisional detention is already excessive and without remedies or bail and should not be expanded in disregard to the human rights of the summarily accused person either under the Fourth, Fifth or Sixth Amendments of the United States Constitution or under internationally protected human rights [see the Universal Declaration on Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966 which protect persons from "arbitrary arrest and detention".]

14 - Unsettled and Unsettling Issues Unresolved by the Supplementary Treaty

The occasion of a new Treaty provides an opportunity to resolve questions which the practice has demonstrated to be in need of resolution. There are indeed a variety of issues which remain unsettled and unresolved in general extradition practice which are also relevant to the practice between the U.K. and the U.S. Among these is the fact that under current U.S. law (18 U.S.C. Section 3181-3191) an extradition request once denied can be reintroduced again without finality of judgment. While this situation does not permit res judicata to set, it also permits, though in limited form, the opportunity for the government to forum shop, and to shop for a magistrate or judge more favorably disposed to the government's position. Such a situation also allows evidence to become stale, and makes renewed judicial determination more dubious as to its fairness.

The same argument concerning stale evidence, lapse of time and renewed adjudication, coupled with the retroactive application of the Supplementary Treaty (Article 4) are susceptible of violating the ex post facto prohibition of the Constitution, and cast doubt on the "due process" of extradition proceedings conducted in such a manner.

Conclusions

For all the reasons stated above the Supplementary Treaty should not be ratified in its present form, and the government should be invited to pursue new and comprehensive legislation which has been before Congress since 1981.

PREPARED STATEMENT OF CHARLES E. RICE

Various objections to the supplementary extradition treaty with the United Kingdom have been adequately analyzed elsewhere, especially in the statement submitted today to this committee by Professor Christopher H. Pyle. Rather than rehearse the issues already covered by others in detail, this statement will concentrate on a few basic reasons why this treaty should not be approved.

The political offense exception, which this new treaty would effectively eliminate with respect to the United Kingdom, protects against the use of American courts for the deliverance of political fugitives whose alleged crimes consist of authentic political dissent or rebellion. In his statement to this Committee, Abraham D. Sofaer, Legal Adviser to the Department of State, said, "The rationale for this new Supplementary Treaty is simple: with respect to

violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment. While this particular agreement relates to the United Kingdom, we fully intend to negotiate -- and are in the process of negotiating -- similar agreements with other nations that meet these criteria." [Statement by Abraham D. Sofaer to Senate Committee on Foreign Relations, August 1, 1985, 22] This new treaty may thus be a prelude to the wholesale elimination of the political offense exception in much the same way that "most favored nation" treatment has been broadly extended in matters of trade. Clearly, Irish Americans are not the only people who should be concerned about this treaty.

The new treaty suffers from three major defects. First, it is overly broad in terms of its stated purpose. Second, it is an abrogation of a legitimate judicial function which the United States courts are adequately exercising. And, third, it is proposed for Senate approval without a proper evidentiary foundation as to the nature of the political and legal system in Northern Ireland. The State and Justice Departments argue that the treaty should be approved because the political system and judicial process in Northern Ireland are fair. Yet the proponents of the treaty have offered no first-hand evidence to this Committee

or to any other committee of the Senate on this point. A prudent consideration of this treaty by the Senate would require a detailed evaluation, based on evidence from persons with first-hand, expert knowledge, of the political and legal system in Northern Ireland, as a similar evaluation would be required with respect to every other nation with which a similar treaty is negotiated in the future.

The Overbreadth of the Treaty

The British Information Services release of June 24, 1985, which announced that the supplementary extradition treaty would be signed on the following day, stated:

The "political safeguard" has a long history going back to nineteenth century legal doctrine but, with the growth of terrorism in the 1970s and the signature of the European Convention on the Suppression of Terrorism in 1977, which removed the "political offence" exception in extradition cases involving violent crimes between EC states, it became less sensible to maintain the exception in cases involving the UK and the USA. There must be a limit to what reasonable people would regard as a political offence and the new extradition treaty covers terrorist offences as well as murder, manslaughter, other offences, and attempts to commit such offences.

As this British statement recognizes, the treaty's elimination of the "political safeguard" is not limited to "terrorist offences" but extends "as well" to various offenses involving violence against person or property.

Opposition to the treaty, of course, does not imply endorsement of the physical force campaign of the Irish Republican Army or, still less, approval of indefensible acts committed by members of that or any other group. But the overbreadth of the new treaty obscures the reality that the situation in Northern Ireland is unique and that it is an oversimplification to treat it merely as an aspect of the necessary effort to combat international terrorism.

The United States has never extradited an Irish rebel to the United Kingdom for alleged crimes arising out of the political resistance to British rule in Ireland. There has been no essential change over eight centuries in the fact and political character of that resistance. What has changed in recent years has been the growth of international terrorism since the early 1970s, with the terrorist events at the 1972 Munich Olympic Games providing a dramatic impetus to efforts to deal with the terrorist problem within a legal framework. It is clear that international terrorists ought not to be able to claim sanctuary under the "political safeguard" which has been generally recognized by the United States and other civilized nations as a protection against the misuse of extradition procedures to oppress persons whose alleged crimes arise out of authentic political rebellion.

The new treaty, however, is overly broad in that it denies the "political safeguard" not only with respect to

the common "terrorist" offenses of aircraft hijacking, aircraft sabotage, crimes against internationally protected persons, including diplomats, and hostage taking, but also with respect to a wide range of offenses against life and property, including possession of firearms, which offenses could otherwise be considered as political offenses if they were committed in furtherance of a political uprising. Authentic political rebellion, whether in Nicaragua, Afghanistan or Northern Ireland, cannot be equated with the terrorism which has plagued the world in recent years. [See N.Y. Times, Aug. 9, 1985, p. 6, col. 6, discussing the Red Army Faction, suspected of involvement in the recent bombing at Rhein-Main Air Base; this group is the successor to the Baader-Meinhof Gang.] Rebels as well as terrorists, of course, have violated the laws of war, including especially the immunity that must always be accorded to noncombatants. In such cases, as will be discussed below, the "political safeguard" carries its own "wanton crimes" exception under which persons accused of such crimes as blowing up civil airplanes, hotels, shops, etc., may be extraditable already in the federal courts.

Judge Sofaer testified that this treaty "narrows the political offense exception as applied to U.K. requests to pure political and nonviolent crimes." The widely accepted distinction between purely political offenses and relative political offenses has been described as follows:

Political offenses historically have been defined as either relative or purely political. Relative political offenses are otherwise common crimes committed in connection with a political act, such as homicide committed in the course of a general uprising. If the nexus between the crime and the political act is sufficiently close, the offense is "relatively political" and not extraditable; if the connection is remote or non-existent the accused may be extradited. Purely political offenses are acts aimed directly at the government and are definitionally limited to treason, sedition and espionage. It is generally agreed that the purely political offenses are not extraditable. [Lubet and Czackes, "The Role of the American Judiciary in the Extradition of Political Terrorists," 71 J. Cr. L. and Criminology, 195, 200 (1980)].

Judge Sofaer's accurate assessment of the effect of the treaty, however, reinforces the conclusion that it is overly broad in terms of its stated objective of combating international terrorism. It cannot be seriously contended that all offenses other than the purely political and the non-violent are international terrorist offenses.

Judge Sofaer, in his statement to this Committee, said that the new treaty "will also be consistent with the rules adopted in 1977 by the Council of Europe which authored the European Convention for the Suppression of Terrorism. That Convention established limits on the political offense exception virtually identical to those contained in this Supplementary Treaty." [Statement by Abraham D. Sofaer before the Senate Committee on Foreign Relations, August 1, 1985, 25-26] In fact the new treaty would go much further

in several respects than the European Convention. This point has been well covered by Professor Pyle in his statement to this Committee today. [See Pyle Statement, 24-31]

The new treaty "amends Article V, paragraph (1)(b) of the current Extradition Treaty by providing that extradition shall be denied if prosecution would be barred by the statute of limitations of the requesting State. The current treaty provision permits the statute of limitations of either the requesting or requested State to apply." [Letter from Secretary of State Shultz submitting treaty to the President, July 3, 1985] As Judge Sofaer acknowledged in his testimony, the United Kingdom has no statute of limitations for the offenses included in the new treaty. This raises the question posed by Senator Biden in the hearings of August 1st, "are we going to be placing ourselves in the position of having to extradite old men whose crimes were committed years ago?" I know of several men, now in their seventies and eighties, who for many years have been productive and law-abiding citizens and residents of the United States and who participated in IRA activities against the Crown forces in Northern Ireland in the 1920s and 1930s. If they were charged by the British with an offense enumerated in this new treaty and arising from that activity of long ago, such as unlawful possession of a firearm, it would appear that they would be extraditable to the United Kingdom even though the statute of limitations for such an offense,

under American law, had long since run. For this reason, I cannot disclose their names but I assure you that these are not fictitious or hypothetical cases. It will be objected, of course, that it is inconceivable that such persons would actually be extradited under the new treaty. But the point is not whether they would be. The point is that it is at least conceivable that they could be. The new treaty would not only be retroactive in its application to such cases as that of Joseph Doherty, it would also be restricted in its backward reach only by the limits of human longevity. To say the least, it is difficult to see how the subjection of law-abiding octogenarians even to the theoretical risk of extradition is relevant to the suppression of international terrorism in 1985. This is definitely overbreadth.

The Treaty As An Unwarranted Interference
With the Judicial Branch

Apart from its overbreadth, the new treaty usurps and politicizes a judicial function which the federal courts are performing well. Judge Sofaer testified that four cases since 1979, in which federal courts held that the Irish Republican Army activities involved in those cases constituted political offenses, "demonstrate a need for this treaty." Those four cases, on the contrary, applied the legitimate "political safeguard," in accord with its governing criteria. [In the Matter of McMullen, Mag. No. 3-78-1099 MG

(N.D. Cal. 1979); In the Matter of Mackin, 80 Cr. Misc. 1 (S.D.N.Y. 1981); In the Matter of Doherty, 83 Cr. Misc. 1 (JES) (S.D.N.Y. 1984); Quinn v. Robinson, No. C-82-6688 (RPA) (N.D. Cal. 1983) (the Quinn case is now on appeal by the Government to the Ninth Circuit Court of Appeals)] Since the political offense exception is incapable of precise definition, its application has always been a matter for judicial determination on a case-by-case basis. [For an example of an inadequate definition, see 50 U.S.C.A. § 1801(c); see also The Proposed Omnibus Antiterrorism Act of 1979 (S. 333, 96th Cong., 1st Sess.)] As Federal District Judge John Sprizzo said in 1984 in denying the extradition of Joseph Doherty to Northern Ireland for the alleged murder of a British soldier committed in the line of Doherty's duty as a member of the Provisional Irish Republican Army, the present treaty "vests the determination of the limits of the political offense exception in the courts and therefore reflects a Congressional judgment that that decision not be made on the basis of what may be the current view of any one political administration." The new treaty would politicize the decision as to whether political rebels should be handed over. In Judge Sprizzo's words, the Doherty case presented "the political offense exception in its most classic form." Whether or not such authentic rebels are entitled to the "political safeguard" as a matter of constitutional right, there can be little dispute that it would be contrary to the

spirit of our laws to abrogate the function of the courts in this area and to revert to the medieval practice of handing political fugitives over for reasons of state.

There is no reasonable basis to fear that the rulings in the four recent cases would commit the United States to a general policy of sanctuary for terrorists. As the Sprizzo opinion in the Doherty case noted, the political offense exception requires more than a finding that the offense was committed in the course of a political conflict. Moreover, Judge Sprizzo excluded from the category of political offenses "atrocities" and other acts "violative of intentional law, and inconsistent with international standards of civilized conduct." "Surely an act," he wrote, "which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the treaty."

The political offense exception, however, Judge Sprizzo continued, is not limited to "actual armed insurrections or more traditional and overt military hostilities." Guerrilla activities, such as those of the IRA, may qualify for the exception. But, as Judge Sprizzo emphasized, "We are not faced here with a situation in which a bomb was detonated in a department store, public tavern or a resort hotel, causing indiscriminate personal injury, death and property damage. . . . Nor is this a case where violence was direc-

ted against civilian representatives of the government, where defining the limits of the political offense exception would be far less clear. Similarly, this is not a case where the alleged political conduct was committed in a place other than the territory where political change was to be effected, a circumstance that would in all probability render the political offense exception inapplicable. . . . Finally, the Court is not presented with facts which establish that hostages were killed or injured or where the principles embodied in the Geneva Convention have clearly been violated." The killing of the British soldier in the Doherty case occurred "in the context of an attempted ambush of a British Army patrol" in Northern Ireland itself. While the IRA engages in a "sporadic and informal mode of warfare," the political offense exception does not extend to "every fanatic group or individual with loosely defined political objectives who commit(s) acts of violence in the name of those so-called political objectives." The IRA, by contrast, in Judge Sprizzo's words, has "an organization, discipline and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade." These extended passages from the Doherty case, the most recently decided of the four IRA cases, are useful to quote here because they confirm that the federal courts do not treat the political offense exception casually. Rather, the courts approach these cases in a careful

and discriminating manner, especially in their affirmation and application of the "wanton crimes" exception.

It is clear, therefore, that in cases involving real terrorist activities, whether of the IRA or anyone else, extradition can already be had in the federal courts under the "wanton crimes" exception and other limitations of the "political safeguard." Thus, Ziyad Abu Eain of the PLO was extradited to Israel in 1981 for bombing a market. [Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894]

The court in Eain held that the petitioner had not carried his burden of proving "that the bombing was incidental to the PLO's objectives." [641 F.2d at 520] "Absent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which, may be reasonably 'incidental to' a political disturbance." [641 F.2d at 520] But, even if petitioner in Eain had established "a direct tie between the PLO and the specific violence alleged," it does not follow that his bombing of civilians would have been shielded by the political offense exception. On the contrary, the Eain court, in dicta, quoted approvingly statements by commentators that "an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception" and that "[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence

especially against the innocent." [641 F.2d at 521 (citations omitted)] The Eain court likened the case to the anarchist activity that was excluded from the exception in the English case, In re Meunier [(1894) 2 Q.B. 415, 419], where the court held that violent activities of an anarchist group directed "primarily against the general body of citizens" are extraditable offenses:

But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates anarchist-like activity, i.e., the destruction of a political system by undermining the social foundation of the government. The record in this case does not indicate that petitioner's alleged acts were anarchist-inspired. Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as petitioner insists, to certain aspects of the PLO's strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like In re Meunier, as to be almost indistinguishable. [641 F.2d at 521-22] (Emphasis added).

The Eain court, moreover, criticized and distinguished U.S. v. Artukovic [170 F. Supp. 383 (S.D. Cal. 1959)], "one of the most roundly criticized cases in the history of American extradition jurisprudence," in which "the magistrate commented in dictum that he believed murders of civilians were political offenses when carried out pursuant to the orders of a Croatian government official who was serving at the time with the blessing of the Axis powers in World War II." [641 F.2d at 522]

The decision in Abu Eain v. Wilkes, therefore, does not

stand for the proposition that "murders of civilians" would be treated as political offenses if they were committed pursuant to the orders or policy of a paramilitary group or even of a government. Interestingly, Judge Sprizzo took specific note in the Doherty case of the fact that Doherty's conduct, even though committed under IRA orders, did not involve attacks against civilians or other atrocities.

This extended discussion of these cases is appropriate to demonstrate that the courts are attentive to the problem of international terrorism and are working out the details of the "wanton crimes" exception as cases arise. It would be a mistake to short-circuit this process by stripping the courts of this jurisdiction which they are exercising responsibly.

In his statement to this Committee, Judge Sofaer equated the activities involved in the IRA cases with recent episodes that could hardly be described otherwise than as terrorist offenses. The two cases described by Judge Sofaer involved airplane hijackings:

In 1972, two American citizens, Holder and Kerkow, hijacked a domestic U.S. flight, extorted \$500,000 from the airline that owned the plane, and forced the pilot to fly to Algeria. They were indicted in the United States for aircraft piracy, kidnapping, and extortion. The U.S. Government requested that France extradite Holder and Kerkow to this country to stand trial. Although the crimes were extraditable offenses under the U.S.-France Extradition Treaty, a French court denied extradition in 1975. The court noted that, at one point in the skyjacking, Holder had demanded that

the plane be flown to Hanoi. He later dropped that demand. Nevertheless, the Court held that Holder's invocation of Hanoi demonstrated that he had acted out of a political motive, bringing the crimes within the scope of the political offense exception.

Another egregious example of overbroad application of the exception resulted from the hijacking in 1973 by five U.S. citizens of a domestic flight. They demanded, and received, \$1 million in ransom for release of the passengers, and then forced the plane to fly to Algeria. Two of the fugitives had escaped from prison, where they had been serving sentences for murder and armed robbery. The U.S. Government sought extradition of the five from Paris in 1976 to stand trial for air piracy. But a French court refused to extradite the fugitives. It accepted their claims that they had hijacked the plane to escape racial segregation in the United States and that the charges against them constituted political persecution. The court therefore held that the skyjacking and extortion were political offenses. [Sofaer Statement, 15-17]

In his testimony, Judge Sofaer stated, "we are justifiably outraged when nations refuse to extradite or prosecute criminals and terrorists who act against the U.S. or Americans. But we cannot credibly assert our outrage on this account and, at the same time, refuse to extradite terrorists to our own allies."

The United States courts, however, would surely treat such hijackings as extraditable offenses whether under international conventions or under the "wanton crimes" exception. Judge Sofaer's point apparently is that because the French courts refused extradition in those cases, the United States should deny the political offense exception not only with respect to aircraft hijacking but also with respect to

the wholly dissimilar offenses for which that exception is abolished by the new treaty. Thus he testified:

"It is common knowledge in the international community that U.S. courts have refused to extradite to the United Kingdom four members of the Provisional Irish Republican Army who are accused, or convicted, of violent terrorist crimes. In each case, extradition was denied because the terrorist crimes were committed as part of a political struggle.

"These decisions direct a blow to the rule of law even more devastating than if Lebanon were to refuse on similar grounds to extradite the killers of Robert Stethem."

Perhaps the most troublesome aspect of the State Department's position in this respect is its underestimation of the ability of the federal courts to draw the elementary and obvious distinction between an aircraft hijacking, on the one hand, and the sort of activity, on the other, encompassed by the time-honored political offense exception. The unreality of the State Department's position is seen in Judge Sofaer's view that even the killing of Lord Mountbatten "is very similar to the four cases in which extradition has been denied under the political offense exception." Lord Mountbatten, Earl of Burma and first cousin to Queen Elizabeth, was assassinated by the Provisional IRA in August 27, 1979, when his pleasure boat was blown up in Donegal Bay. In addition to the 79-year-old Mountbatten, the blast killed his daughter, her fourteen-year-old son and the fifteen-year-old local boy who had been hired to crew the

boat. [Jack Holland, Too Long A Sacrifice (1981), 148-50] The assassination of Mountbatten and his companions, who were evidently not involved in any military activity and who, apart from honorific titles, could hardly be defined as military personnel, cannot be reasonably equated with the sort of military conflict which was involved, for example, in the Doherty case and which Judge Sprizzo described as presenting "the political offense exception in its most classic form." Yet Judge Sofaer testified that, "I don't think there is any difference between the killing of Mountbatten and the killings of the law enforcement officer and the captains that are in the four cases that we are talking about here." In view of the inability or unwillingness of the State Department to make such elementary distinctions, it is not surprising that the treaty negotiated by the Department is overinclusive. Moreover, the Department's position unfairly assumes that the courts, too, are incapable of making the distinctions required in cases involving "wanton crimes."

Judge Sofaer, in his statement to this Committee, urged approval of the treaty "as a priority matter" on the grounds that, "We must not allow our country to become a haven for terrorists who belong to groups that use indiscriminate violence against the citizens of other countries -- just as we expect that foreign governments should not harbor terrorists who commit violent acts against United States citizens."

[Sofaer Statement, 21-26] The overinclusiveness of the treaty, however, is seen in its failure to limit itself to the problem as thus described by Judge Sofaer. And, in the process, it disparages the courts by denying that they are even capable of distinguishing such cases of "indiscriminate violence against the citizens of other countries" from cases involving authentic political offenses.

It is ironic that a conservative Administration, properly concerned about judicial activism, should mount a crusade to abrogate the function of the courts in one area where they perform well. There is no sufficient reason to remove from the federal courts their power, which they prudently exercise, to apply the "political safeguard" so as to distinguish terrorists from authentic political rebels.

The Lack of an Evidentiary Foundation
for Approval of the Treaty

The case for this new treaty rests upon the premise that "with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." [Sofaer Statement, 22] In light of this premise, a prudent consideration of this treaty by the Senate would require an inquiry into the fairness of the political system and the legal process in Northern Ireland,

as a similar inquiry would be required with respect to every other nation with which such a treaty is made in the future. Such an inquiry should include the taking of testimony, subject to cross-examination, of persons with first-hand, expert knowledge of the issues. The proponents of the treaty should have the burden of proof on these issues. Yet the proponents, to the best of my knowledge, have presented no evidence to this or any other committee of the Senate, other than the conclusory assertions by Judge Sofaer and Deputy Attorney General Jensen that the political and legal system in Northern Ireland is fair.

A searching inquiry into this subject, by this or some other committee of the Senate, is warranted because there are numerous persons with first-hand experience and expert knowledge of the situation who have publicly criticized the British regime in Northern Ireland as unjust and oppressive. Their testimony would seem to be essential to an evaluation of this treaty by the Senate, as would visits to Northern Ireland by members of this and other relevant Senate committees to see the situation first-hand and to talk with those who can provide, in Fr. Denis Faul's apt phrase, the "worm's eye view" of what it is like to live under the regime in that place.

I do not propose in this statement to try to prove the case that the political and legal system in Northern Ireland is unfair. Apart from the fact that the proponents of the

treaty have the burden of proof which they have not even attempted to satisfy, proof as to the injustice of the Northern Ireland regime should come from persons with first-hand, experienced and expert knowledge of the matter. I can merely offer a few excerpts from the many public statements of such persons in the hope that it will move this or some other committee of the Senate to make the extensive inquiry which would seem to be required.

An important and cautionary note is in order at this point. In evaluating the evidence that could be presented on this issue, it is essential to avoid any preconception that opposition to the British regime -- and to this treaty -- is limited to those who overtly or covertly support the physical force campaign of the IRA. Sean MacBride, a former Foreign Minister of the Republic of Ireland and founder of Amnesty International, whose views on the subject I wholly endorse, opposes this treaty but has explicitly rejected the use of forcible resistance to the Northern Ireland regime. In his address of January 16, 1984, to the Irish American Unity Conference, Mr. MacBride said, "I am not in favour of the use of physical force, or of the activities of the different paramilitary groups. I do not think they are justified, and I think that Partition could be ended by political means provided our political parties made the necessary effort. It has been the failure of our political parties and of Britain to take any steps to bring about the end of

the Partition that has been the cause of the escalating violence in Ireland."

Judge Sprizzo noted that the offenses with which Joseph Doherty was charged were "but the latest chapters in that unending epic" of "old hatreds and political divisions which were spawned by England's conquest of Ireland in medieval times." As Judge Sprizzo stated, the IRA was "dormant" when British troops were introduced into Northern Ireland in 1969. It was only after the activities of the British "become a subject of increasing antipathy and concern" that the IRA was revived.

Since the British divided Ireland by Partition in 1921, Northern Ireland has been ruled under continuous emergency powers. The British regime has been characterized by gerrymandering, oppressive legal procedures and economic and social discrimination directed against the Catholic population. As Sean MacBride stated in his letter to this Committee, a copy of which is attached hereto, Partition has led "to an on-going insurrectionary situation which has disrupted the whole political and economic life of the country and has caused a great many casualties. . . . In Northern Ireland, unarmed 'Civil Rights' demonstrators have been killed by British military forces, in the course of peaceful demonstration; unarmed Republican suspects have been shot at sight by British forces; many sectarian and political assassinations have been carried out either directly by the

British forces, or have been instigated by British secret services agents. British appointed judges have justified the operation of police and military assassination squads in Northern Ireland. Some Irish Republicans have sought shelter from harassment or from an unjust judicial system in the United States as a result of this situation. None of these events is in any way connected with . . . international terrorism."

Any serious inquiry into the subject should include testimony from representatives of the Northern Ireland government and of all the political parties there, including Sinn Fein. No such inquiry would be complete, for instance, without hearing testimony from such leaders of Sinn Fein as Gerry Adams and Martin McGuinness, who have been consistently denied visas to enter the United States to present their views to the American people. However, the case can be made that the political and legal system in Northern Ireland is unjust through numerous expert witnesses who are not advocates of paramilitary activity. David Lowry, for example, has provided expert analyses of the legal process, the use of plastic bullets and other aspects of the system. [Lowry, *Terrorism and Human Rights: Countersurgency and Necessity at Common Law* 53 N. Dame Lawyer 49 (1977); Lowry, *The English System of Judicial Injustice in Northern Ireland* (undated) (Reprinted in Cong. Rec. Aug. 1, 1980, H6991); David Lowry, *State Terrorism: The British Use of Plastic Bullets in*

Northern Ireland (1982)].

With respect to the fairness of the non-jury Diplock courts in Northern Ireland, Judge Sofaer testified that, "I don't think it is an abusive court system. If I did, I would agree with you, that we should not ratify." Under the Northern Ireland Emergency Provisions Act 1978, a statement, whether written or verbal, made by the accused may be introduced by the prosecution unless "the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement." [Emergency Provisions Act 1978, Sec. 8; see also generally, Prevention of Terrorism Act 1974, as amended in 1976] Thus, the statement may be admissible even if involuntary. [See discussion in Greer, The Admissibility of Confessions Under the Northern Ireland (Emergency Provisions) Act, 31 N. Ireland Legal Q. 205 (1980)] Nor will even torture, inhuman or degrading treatment cause the statement to be excluded unless the accused can produce "prima facie evidence" that the treatment was inflicted "in order to induce him to make the statement." According to the British Government's Bennett Report, during the first six months of 1978, the courts heard 568 cases of persons charged with scheduled offenses. 94% resulted in convictions. "These figures show a remarkable consistency with the earlier results in 75-80 percent of these cases, the prosecution case depended solely or mainly on the confession of the accused." [Report of the

Committee of Inquiry into Police Interrogation Procedures in Northern Ireland, Cmnd. 7497 HMSO (London), March 1979, 10]

Solicitors and barristers who have participated in the ongoing and mass trials of defendants accused by "supergrass" informers could provide up-to-the-minute insights into the workings of the judicial process. Among these would be such legal experts as Oliver Kelly, Desmond Boal, Patrick Finucane and others. Professor Kevin Boyle of University College, Galway, among others, has written extensively on the legal system in Northern Ireland. [See, for example, Kevin Boyle, Tom Hadden and Paddy Hillyard, *Ten Years On in Northern Ireland: The Legal Control of Political Violence* (1980); Lord Gifford, *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (1984)]

Fathers Denis Faul, Raymond Murray and Brian Brady, who are outspoken critics of paramilitary activities, have published a miniature library of analyses of the juridical and other oppressions in Northern Ireland, from the escalation of the trouble in 1968 right up to the present day. [See, for example, Brady, Faul, Murray, *Corruption of Law* (1974), 23; Brady, Faul, Murray, *Corruption of Law* (1974), 21, 24; Brady, Faul, Murray, *Internment: 1971-1975* (1975), 4-5; Faul and Murray, *The Shame of Merlyn Rees* (1975); Faul and Murray, *British Army and Special Branch RUC Brutalities: December, 1971-February, 1972* (1972); Faul and Murray, *Violations of Human Rights in Northern Ireland, 1968-1978*

(1979); Faul and Murray, *The British Dimension: Brutality, Murder and Legal Duplicity in Northern Ireland* (1980); Faul and Murray, *Plastic Bullets - Plastic Government: Deaths and Injuries by Plastic Bullets, August 1981-October 1982* (1982); Faul and Murray, *Rubber and Plastic Bullets Kill and Maim* (1981); Faul, *A Law Committed to Attack - Not to Defence*, *Belfast Sunday News*, Oct. 30, 1983, p.8, col. 1; Faul and Murray, *Danny Barrett: A British Army Murder* (1982); Faul and Murray, *SAS Terrorism: The Assassin's Glove* (1976), describing the clandestine activities of the British Special Air Service in perpetrating assassinations; Faul and Murray, *The Sacredness of Human Life: An Invitation to Debate* (1982), 2-3] Incidentally, in arguing last March that "a policy of systematic releases from the prisons of young persons both Catholic and Protestant is the infallible recipe for ending violence within six to 12 months," Fathers Faul and Murray charged that many of those in power in Northern Ireland do not appear to want the violence to cease:

"Their fat pickings and power over the Catholics, the possession and fairly unfettered use of guns are so desirable to them that they have no wish to see an end to violence.

"Their political masters have spoken of 'an acceptable level of violence' and this is sufficient to ensure the continuity of pay, perks and power."
[*Irish Advocate*, March 30, 1985, p.16, col. 1]

Father Murray has poignantly described the sort of abuse which helps to account for the rise of paramilitary

resistance in Northern Ireland:

They saw the British Army entering their homes night after night, insulting the womenfolk by foul and filthy language, tearing down the holy pictures from the walls with insulting words about Our Lord, the Blessed Virgin, and our holy father the Pope. They were endlessly searched and frisked and made to stand in search positions or lie on the pavements of their own streets. If some of these deprived youngsters threw a stone or made a rude gesture or used a foul expression to their tormentors, or if they got involved in paramilitary activity and took more serious action against their oppressors, they had to suffer the full vigour of emergency laws, illtreatment, dragged before courts, given the maximum sentence. [Faul and Murray, *Violations of Human Rights in Ireland, 1968-78* (1979), 1]

Another witness who could attest to the reality of the system is Father Desmond Wilson, who works among the poor in the Belfast ghetto of Ballymurphy. "We are now in the same position," Father Wilson told me in commenting on the judicial system, "as many totalitarian governments where we are on the way to the position where the police can arrest anyone they want, they can bribe and threaten in efforts to put away their political opponents. This is the classic tactic of totalitarian governments. People make the mistake of believing the British government is a very well developed democracy but in fact it is acting in Ireland as a dictatorship and a dictatorship of the worst kind." [See generally Wilson, *Against Violence in Ireland* (1984)]

The new treaty addresses a symptom rather than the cause. In the words of the 1983 statement made to the New

Ireland Forum by an interfaith committee headed by Dr. George Gordon Dallas, a Belfast Presbyterian, the "unjust society" in Northern Ireland, "with no prospect of alleviation as far as the most deprived section of the Catholic population are concerned allows the latter no alternative but to support groups committed to violence. Some men are involved in evil who would not otherwise be evil, so that the greater evil is that of those who allow the injustice to continue. Alongside this the British approach has been to deal first with violence, instead of looking first at what is wrong."

In short, IRA resistance is a predictable response to the seminal violence of the regime. The reality that the IRA is a symptom rather than the cause of the problem, was explained by Cardinal Tomas O'Fiaich, Roman Catholic Primate of Ireland, in a remarkable recent interview that is worth quoting at length:

I have been convinced for years that this is not a question of violence on its own or that increased security will get rid of it. The violence is only a part of something deeper. Violence has been liable to break out since the six-county State was set up. And I'm afraid that it is liable to continue until some modification is made in the political set up. We had violence when the State was first set up in 1922. There was violence in the 30s, the 40s, the 50s and the early 60s.

So it is not simply a matter, as a lot of English people seem to think, of the security forces getting on top of the violence and eliminating the IRA. Because even if they eliminate the present generation, in another decade there is liable to

be a fresh outbreak.

I think the position is well summed up by a word that is now common currency, which some people didn't wish to accept at first but are willing to accept now: "alienation." That is, the Catholic population on the whole are alienated from the State itself, from the security forces, from the courts, from everything that is looked upon as part of the Northern setup.

I think that only a radical change will wean away some people, especially the younger generation, from violence. I'm sure most of the violence over the last few years has been carried out by relatively few people. The number of nationalists who would condone violence is also only a small percentage.

But the feeling of alienation is getting deeper among the nationalist population as a whole.

The only ultimate solution would involve British disengagement. But that has to be worked towards.

The present policy of the British Government -- that there will be no change in the status of Northern Ireland while the majority want British rule to remain -- is no policy at all. It means you do nothing, and it means that the Loyalists in the North are given no encouragement to make any move of any kind. It is an encouragement to sit tight. Any group that is guaranteed ascendancy as long as it is in a majority doesn't have to do anything.

I would like to see that British policy changed into a positive form. I would like them to say, "just as we brought British colonialism to an end in other parts of the world we are not going to be in Northern Ireland ad infinitum. Our presence in Ireland, which was based on conquest in the past, is now a post-colonial situation, and ultimately we would like to see all Ireland ruled by Irishmen. While we are waiting to move out we would like to use our good offices to try and bring Protestants and Catholics together."

I think that would be a much nobler aspiration for a British government than the present kind of negative attitude."

The basic conflict in Northern Ireland was not a religious one.

I don't think that even a group as cruel and ruthless as the IRA will kill Protestants as Protestants. They are killing many members of the RUC, UDR and so on who happen to be Northern Protestants. But they are killing them because they are members of the security forces, not because they are Protestants. [Boston Irish Echo, August 3, 1985, p.12, col. 1]

As a Catholic county councillor in Northern Ireland, who is not a paramilitary supporter, told me, "the Catholic people regard the IRA as an insurance policy. They don't quite trust the IRA, but they don't trust the Brits and they fear that without the IRA they would be at the mercy of the Brits."

The point of the inquiry that should be made by the Senate would not be to explore the merits and demerits of the IRA and its campaign of force. Nor does the inquiry concern the views of the witnesses from Northern Ireland on the question of whether the treaty itself should be approved as a matter of American law and policy. Rather, the limited issue is whether the proponents of the treaty have met their burden of establishing their own premise of the fairness of the political and legal system in Northern Ireland.

Conclusion

The new treaty would implicitly legitimize the disputed British possession of Northern Ireland by broadly stigma-

tizing past as well as present resistance to it -- by Eamon de Valera as well as by Joseph Doherty -- as what Judge Sofaer calls "mere criminality." But there is no reason to hope that this approach will curb the resistance in Northern Ireland. The British have tried that for 60 years and it has only made matters worse.

If the present perspective of looking at the symptom rather than the cause of the Northern Ireland conflict is maintained, the cycle of violence will continue to the detriment of the United States as well as of the innocent people of Northern Ireland. Instead of implicitly endorsing the tragic injustice of the past six decades, the United States ought to promote a peaceful solution in Northern Ireland by encouraging the British to restore legal justice there and to commit themselves to an orderly withdrawal in a reasonable time so as to permit the Irish to determine their own affairs independently of foreign intervention.

FROM: SEAN MACBRIDE, S.C.

ROEDUCK HOUSE,
CLONSKEA,
DUBLIN 14,
IRELAND.

His Excellency,
The Hon. Senator Richard Lugar,
Chairman of the Foreign Affairs
Committee of the Senate of
the United States,
The Senate,
Capitol Hill,
Washington D.C.
United States.

23rd July, 1985

Dear Senator,

As one who has been closely involved in the Constitutional and Political developments in Ireland for some sixty years and as an Irishman who has had the honour of knowing and working with some of your leading Statesmen such as the late President Harry S. Truman, President John F. Kennedy and Ambassador Averill Harriman, I am taking the liberty of writing to you, in your capacity as Chairman of the Foreign Affairs Committee of the Senate of the United States, in order to make a special request through you to the Foreign Affairs Committee of the United States Senate.

In addition to my involvement in Irish affairs, I have been involved in the building of the Council of Europe, the protection of Human Rights throughout the world including the foundation and promotion of Amnesty International. I enclose herewith a fairly extensive biographical note concerning myself in order to establish my credentials with you.

My respectful request to you, and through you to the Foreign Affairs Committee of the Senate is that I be permitted to appear to give oral testimony at the Hearings which are to be held by the Senate Foreign Affairs committee concerning the Amending Treaty to the Extradition Treaty, signed on the 25 June, 1985 by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States. I have so far been unable to procure a copy of this Amending

Treaty but from press reports I understand that it's intention is to facilitate the Extradition of Irish political offenders from the United States to Great Britain and/or Ireland.

My concerns concerning the new proposed Amending Treaty are based on five somewhat different grounds with which I propose deal separately hereunder:

Ground NO. I. Intended device to involve the United States in the Anglo-Irish Conflict relating to the Partition of Ireland

Availing of the natural public indignation arising from the hijacking of planes, the taking of hostages, and the murder of American citizens in the present wave of international terrorism, the British Government has very adroitly urged the US Administration to amend it's existing Extradition Treaty with Great Britain, in such a way as to involve the United States on the side of Great Britain in the Anglo-Irish conflict which has been raging since Ireland was partitioned by Great Britain in the year 1920. Under the cloak of wishing to stamp out international terrorism, the present British Administration is seeking, directly or by implication, to secure the support of the United States in Britain's claim to exercise sovereignty over the north-east corner of Ireland, known as "Northern Ireland".

For centuries, Britain has sought to claim sovereignty over, and to rule Ireland, a claim which has been steadfastly rejected by the Irish People. In the course of the nineteenth century, as a result of British rule, oppression and famine, the population of Ireland was halved. It was only in the course of this century, following upon the Rising of Easter 1916, that in 1921 Britain had to relinquish her military and political occupation of the greater part of Ireland. However, in 1920 before relinquishing her military occupation of Ireland, Britain partitioned Ireland into two states - one consisting of six counties now known as "Northern Ireland", and the other consisting of twenty-six counties which form the "Republic of Ireland" today. The

partitioning of Ireland was never sanctioned or accepted by the people of Ireland. The imposition of Partition, and of the Treaty of 1922, led to a bitter Civil War in Ireland. The imposition of Partition, has also led to an on-going insurrectionary situation which has disrupted the whole political and economic life of the country and has caused a great many casualties. According to official statistics since 1969, there have been over 43,000 separate bombing and shooting incidents, and causing over 2,500 deaths. Statistics as to casualties between 1920 and 1969 are not available but are believed to be on a higher scale.

In Northern Ireland, unarmed "Civil Rights" demonstrators have been killed by British military forces, in the course of peaceful demonstration; unarmed republican suspects have been shot at sight by British forces; many sectarian and political assassinations have been carried out either directly by the British forces, or have been instigated by British secret services agents. British appointed judges have justified the operation of police and military assassination squads in Northern Ireland. Some Irish republicans have sought shelter from harassment or from an unjust judicial system in the United States as a result of this situation.

None of these events are in any way connected with the international terrorism which has given rise to a number of proposals to combat international terrorism.

It is to the credit of the United States and of its judicial system that ever since the eighteenth century, the United States Courts have steadfastly refused to extradite Irishmen by reason of their political activities in Ireland. The United States have always boasted, with justice, that it was the land of freedom in which those who were politically oppressed would receive asylum and shelter. For close on 200 years at least, Irishmen charged with offences arising from the insurrectionary situation in Ireland have never been extradited; this has also

.../...

been the universal rule in every civilised country ever since the middle of the last century. Many famous Irish leaders such as Wolfe Tone, James Stephens, John O'Mahoney, John Mitchell, Thomas Francis Meagher, Liam Mellows, and President Eamon deValera benefited from the protection of the American legal system both in regard to extradition and asylum. Had the proposed Amending Treaty been in existence they would have all been handed over to the British for imprisonment or execution.

The decisions of the Courts of the United States have been strictly based on the concepts of international law in regard to the non-extradition of persons for political offences or for politically related activities. The law in this matter is fully reviewed in two recent cases of the US District Courts, namely: the Desmond Mackin case Judgment by Naomi Reice Buchwald (80CR MISC.I, P 54 US Magistrates) and the judgment of John E. Sprizzo, in the Doherty Case.¹

The number of Irish Republicans in respect of who the British authorities have sought extradition is extremely small and it is not estimated that there are more than a half dozen Irish Republicans seeking political asylum in the United States. This makes it very clear that the real motivation of the British administration in the promotion of the Amending Treaty is really to secure the support of the United States for the partition in Ireland.

Ground No 2. Attempt to link the question of Irish Sovereignty and Unity to the present wave of international terrorism.

Anyone with even a superficial knowledge of Anglo-Irish-American relations is fully aware that the struggle for the independence, sovereignty, and Unity of Ireland is a very old standing dispute between Great Britain and Ireland, and is in no way related to present day international terrorism.

.../...

1. 83 Cr. Misc. 1, page 26 (jes)
United States District Court

Enough has been said in developing the previous ground No. 1 to make it abundantly clear that the present reactionary situation in Ireland is completely unrelated to the international terrorism which has become apparant in recent years. It is part of the struggle of the Irish People to assert and make effective the sovereignty of the Irish People over the whole of the island of Ireland. Irish people have overwhelmingly decided, both in 1918 and again in 1937 that they claim jurisdiction over Ireland and reject any claim by Britain to interfere in Irish affairs. This was reaffirmed by the Declaration unanimously adopted by Dail Eireann (the Irish Parliament) on 10 May 1949.

Ground No 3. Nationality of Extraditee

Under Irish Constitutional and Nationality Law, every person born in Ireland, North or South, is regarded as an Irish citizen. If, as appears pretty certain, the intention of the proposed Amending Extradition Treaty, is to secure the extradition of Irishpersons from the United States to Great Britain or to Northern Ireland, it is a law which will be dealing with Irish citizens and therefore of direct concern to the Republic of Ireland. All those likely to be affected by extradition proceedings envisaged will be citizens of the Republic of Ireland. Accordingly, it would not seem unreasonable to ascertain whether the United States Governme has consulted the government of the Republic of Ireland before entering into this proposed Amending Treaty, and if s what views have been conveyed by the Irish Government to the Government of the United States.

Ground No 4 The norms of the Rule of Law or due process of law have ceased to obtain in Northern Irela

For some considerable time past, the normally recognised standards concerning the application of the Rule of Law for criminal trials, and to the criminal process have ceased to apply in Northern Ireland. Jury trials have ceased to exist in political cases;

.../..

instead, single-court judges known as "Diplock" courts have replaced Jury trials. The ordinary rules of evidence have been altered and corroboration in what are known as supergrass trials has ceased to be required. Persons suspected of political offences are often detained for two and even three years before being brought to trial. The interrogation methods adopted by the police authorities in Northern Ireland have been criticised and condemned by the European Commission on Human Rights, and described as degrading and inhuman. Some members of the judiciary have sought publicly to justify the killing of unarmed suspects by the security forces. It is submitted that in such circumstances it would be highly improper for the United States to extradite to Northern Ireland any Irish person who might then be submitted to inhuman or degrading treatment and who might thus be deprived of the full protection of the due process of law and the rule of law applicable to criminal trials. The United States might thus be placed in a position of condoning violation of human rights.

Ground No 5. Dangerous precedent

Quite apart from the Irish aspect to the proposed Amending Treaty between Britain and the United States, it is submitted that the Treaty may form a dangerous precedent to facilitate the extradition of persons involved in political offences to other jurisdictions where they may be deprived of their elementary and fundamental human rights. The ratification of such an Amending Treaty in the case of the United States, England and/or Ireland would therefore constitute a dangerous precedent in the future that might tend to weaken the protection of Human Rights in other portions in the world.

I enclose herewith copy of the basic relevant Constitutional Documents, which together constitute the Charter of Liberty of the Irish People:

- (a) The Proclamation of Easter 1916
- (b) The Declaration of Independence, 21 January 1919

- (c) The Constitution of Ireland, Articles 1-5, enacted by the Irish People on 1 July 1937
- (d) The Republic of Ireland Act 1948 (21 December 1948)
- (e) Unanimous Declaration of Dail Eireann (The Irish Parliament) of 10 May 1949, sent to all the Parliaments of the world

I shall be only too glad to furnish you with any additional information you might desire. Should I be given the opportunity of appearing at oral Hearings of the Foreign Affairs Committee of the Senate, I shall, if desired, prepare written summary of my submissions.

In conclusion, may I mention that while I took an active part in the Irish liberation movement from 1920 onwards until the enactment of the Irish Constitution on 1 July 1937, I have not participated in any unconstitutional activities since. On the contrary, I have condemned repeatedly the use of violence and the actions of the IRA and similar organisations.

Forgive me for writing at such length but I felt that it was my duty to bring these matters to your attention.

With respectful warm best wishes,

Yours faithfully,

Sean MacBride

Sean MacBride, M.P.

NATIONAL BOARD

OFFICE OF THE
NATIONAL PRESIDENT



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ANCIENT ORDER
of HIBERNIANS IN AMERICA
INCORPORATED
Organized in New York City, May 4, 1836

STATEMENT SUBMITTED
TO U.S. SENATE FOREIGN RELATIONS COMMITTEE
SEPTEMBER 18, 1985
WASHINGTON, D.C. BY
MR. JOSEPH ROCHE, NATIONAL PRESIDENT
ANCIENT ORDER OF HIBERNIANS

FOR REASONS WHICH REMAIN UNCLEAR TO ME, I WILL NOT BE PERMITTED TO ADDRESS THE SENATE FOREIGN RELATIONS COMMITTEE ON A MATTER OF SOME SIGNIFICANCE PARTICULARLY TO AMERICANS OF IRISH DESCENT BUT ALSO TO ALL THOSE WHO RESIDE IN IRELAND. THE COMMITTEE IS CONSIDERING AMENDMENTS TO THE 1972 ANGLO-AMERICAN EXTRADITION TREATY. IF THESE AMENDMENTS WERE TO EFFECT ONLY DIPLOMATS OR LEGAL SCHOLARS, THE DENIAL OF AN OPPORTUNITY TO SPEAK WOULD BE UNDERSTANDABLE -- EVEN WELCOME. THIS IS NOT THE

"Ireland Unfree Shall Never Be At Peace."

CASE, IT IS NO EXAGGERATION TO STATE THAT THESE CODICILS DIRECTLY CONCERN AND EFFECT AMERICANS OF IRISH DESCENT AND CERTAINLY ALL THOSE WHO ARE HIBERNIANS. MORE IMPORTANTLY, THE IMPACT OF THESE AMENDMENTS SHOULD TROUBLE THE CONSCIENCE OF ALL AMERICANS.

THE CHANGES PROPOSED FOR THE TREATY, IN THEIR PRISTINE LEGAL PURITY, ARE A BRAZEN ATTEMPT TO REVISE HISTORY LIKE NO COMMUNIST COUNTRY HAS DONE. THE FALSEHOOD THAT WOULD BE TURNED INTO TRUTH BY THE ADOPTION OF THESE AMENDMENTS IS THAT IT IS CRIMINAL TO OPPOSE WITH FORCE OR OTHERWISE, A LONG STANDING TYRANNY AND DESPOTISM WHICH DEFIES DEMOCRACY. IT IS ALSO NO EXAGGERATION TO STATE THAT THE ADOPTION OF THESE CHANGES WILL REQUIRE AMERICAN HISTORIANS TO RECORD THE NAMES OF MENACHEM BEGIN, BENIGNO ACQUINO, ROBERT MUGABE, NELSON MANDELA OR PATRICK HENRY NOT AS DEFENDERS OF FREEDOM AND JUSTICE BUT AS SOCIAL MISFITS AND PATHOLOGICAL LIARS.

YOU HAVE BEFORE YOU THE UNREFUTABLE DOCUMENTATION OF ENGLANDS ECONOMIC, POLITICAL AND SOCIAL SUBJUGATION AS WELL AS MILITARY OCCUPATION OF SIX COUNTIES OF IRELAND. YOU ALSO HAVE THE INCISIVE LEGAL OPINIONS AND ANALYSIS OF THE INTERNATIONAL LAWYERS INQUIRY, AMNESTY INTERNATIONAL AND THE EUROPEAN PARLIAMENT AND THE COURT OF HUMAN RIGHTS. WITH THIS STATEMENT YOU WILL HAVE THE VIEWS OF A FORGOTTEN ELEMENT IN AMERICAN FOREIGN POLICY -- THE CONSTITUENT -- WHO IS ALLOWED TO SIT ON THE SIDELINES AND WATCH THE DIGNITY AND THE BROTHERHOOD OF MAN REDUCED TO A DEADLY GAME OF PETTY POWERPLAYS. I FIND DEEPLY DISTRESSING THAT FOR AT LEAST A DECADE LITERALLY THOUSANDS OF AMERICANS AND THEIR

ELECTED OFFICIALS HAVE SOUGHT WITHOUT SUCCESS SENATE HEARINGS ON ENGLISH OCCUPATION AND MISRULE IN IRELAND. SUDDENLY THE SENATE AWAKES FROM ITS SLUMBER OF INDIFFERENCE AND, WITH UNSEEMLY HASTE, SEEKS TO SANCTIFY THE OPPRESSION IN IRELAND AND CRIMINALIZE THE VICTIM. IT IS SAD ENOUGH TO SEE THE IRISH GOVERNMENT ACTING LIKE ENGLAND'S TRAINED SEAL BUT FOR THE PRESIDENT OF AMERICA TO DIGNIFY THIS REQUEST IS IRRATIONAL, OFFENSIVE AND QUITE BEYOND MY COMPREHENSION.

LET ME ELABORATE. IN JULY OF THIS YEAR, THE AMERICAN BAR ASSOCIATION MET IN LONDON. LORD HAILSHAM, THE LORD HIGH PRIVY - OR SOME SUCH NONSENSE -- SPOKE TO THE DELEGATES OF THE FRAILTIES OF LAW AND RECALLED THAT "SIR THOMAS MORE WAS FALSELY CONVICTED OF TREASON UNDER AN UNJUST STATUTE, PASSED BY A HOMICIDAL PRINCE ON THE PERJURED EVIDENCE OF HIS SOLICITOR GENERAL." FOR ALL WHO LIVE IN SIX COUNTIES OF IRELAND -- WITHOUT DISTINCTION -- THINGS HAVE NOT CHANGED TERRIBLY MUCH IN 400 YEARS. FOR SECRETARY SCHULTZ TO SUGGEST OTHERWISE IS A REFLECTION EITHER OF HOW MISINFORMED HE IS OR HOW MUCH HE SEEKS TO MANIPULATE CONGRESS. EXAMPLES OF THIS MANIPULATION ABOUND BUT CONSIDER A CLASSIC CASE WHICH OCCURRED AT THE SAME A.B.A. CONVENTION. PRIME MINISTER THATCHER IN HER ADDRESS ASSURED THE DELEGATES " BRITAIN ABHORRED CENSORSHIP." IN LESS THAN A MONTH SHE BANNED FROM THE BBC AN INTERVIEW WITH AN ELECTED IRISH OFFICIAL.

I OFFER THIS ILLUSTRATION BECAUSE YOU HAVE BEEN ADVISED BY THE RECENTLY DISMISSED HOME SECRETARY LEON BRITTAN THAT THE EXISTING EXTRADITION TREATY

" IS NOT SUITABLE FOR TWO DEMOCRATIC COUNTRIES
SHARING THE SAME HIGH REGARD FOR THE FUNDAMENTAL
PRINCIPLES OF JUSTICE AND OPERATING SIMILAR
INDEPENDENT JUDICIAL SYSTEMS..."

YOU CAN BE ASSURED THAT THE SHAM JUDICIARY IN NORTHERN IRELAND IS EVERY BIT AS INDEPENDENT IN DISPENSING JUSTICE AS THE BBC IS IN INDEPENDENTLY REPORTING NEWS FROM IRELAND. MR. BRITTAN WOULD HAVE YOU BELIEVE THAT MY CONCERNS ARE TYPICAL OF THE DREAMY SENTIMENTAL IRISH-AMERICAN WHO SINGS OF YESTERYEARS HERO'S AND VILLAINS. NOTHING COULD BE FURTHER FROM THE TRUTH, THE ULSTER GARRISON IS A NIGHTMARE OF COLONIAL CARNAGE AND STUPIDITY TO THIS DAY. ONLY THOSE DREAMING OF EMPIRE GLORY COULD BE SO BLIND AS TO NOT SEE THAT. CONSIDER:

(1) THE "DEMOCRACY" TO WHICH THE HOME SECRETARY WOULD HAVE YOU RETURN ACCUSED IRISH CITIZENS IS A MONARCHY WITH A STATE RELIGION AND A SUPREME COURT MADE UP OF LANDOWNERS. THE ULSTER GARRISON RESTS ON A PRIMITIVE SECTARIANISM AND HAS BEEN OCCUPIED WITH THE AID OF EXTRAORDINARY DRACONIAN POWERS SINCE THE CIVIL AUTHORITIES ACT OF 1922. IN MANUFACTURING THEIR MAJORITY IN SIX COUNTIES, ENGLAND IGNORED THE LAST DEMOCRATIC ELECTION IN ALL OF IRELAND IN 1918 AND SECRETLY ARMED FASCIST BIGOTS IN SIX COUNTIES WHILE "NEGOTIATING" PEACE. MOREOVER, HALF OF THOSE NATIONALISTS ELECTED IN 1918 WERE IN PRISON FOR THE VERY OFFENSES YOU WOULD MAKE EXTRADITABLE.

(2) THE ENGLISH "PRINCIPLES OF JUSTICE" TO WHICH MR. BRITTAN REFERS ARE NOT THOSE SHARED BY MANY AMERICANS. NOT ENOUGH BAD THINGS CAN BE SAID ABOUT THE LATEST PERVERSIONS OF LAW CALLED DIPLOCK COURTS AND SUPERGRASS TRIALS.

ONE WOULD HAVE THOUGHT ENOUGH BAD THINGS HAD BEEN SAID ABOUT THE ROYAL ULSTER CONSTABULARY & B. SPECIALS IN THE 1970 HUNT COMMISSION REPORT BUT THAT DID NOT STOP ENGLAND FROM ORDERING .357 MAGNUM PISTOLS FOR THEM IN 1976. THE BAN ON THE RUC ARMS SALES YOU ADOPTED THEN WAS THE LAST DEMONSTRATIVE CONCERN FOR INJUSTICE IN IRELAND. IN CASE YOU HAVE BEEN LED TO BELIEVE ANYTHING HAS CHANGED, THE 1984 KILBRANDIN REPORT HAS CALLED FOR THE DISBANDING OF THE ULSTER DEFENSE REGIMENT WHICH HAS BEEN KILLING CIVILIANS WITH ALARMING FREQUENCY.

IN THIS LAND OF VIOLENCE AND INJUSTICE WHERE A PUBLIC OFFICIAL HAS CALLED FOR THE "INCINERATION OF CATHOLICS" AND ENGLISH UNDERCOVER AGENTS SET OFF BOMBS IN DUBLIN (LITTLEJOHN AFFAIR) AND ASSASSINATE CIVILIANS (TULLY-WEST), IT IS HARDLY SURPRISING ANYONE WOULD BE CHARGED WITH POSSESSION OF A FIREARMS -- AN OFFENSE INCLUDED UNER THESE AMENDMENTS. BOBBY SANDS WAS ARRESTED FOR BEING IN A CAR WHERE A FIREARM WAS FOUND AND FOR ADMITTED MEMBERSHIP IN AN ILLEGAL ORGANIZATION. HE WAS SENTENCED TO 14 YEARS IN PRISON. NELSON MANDELA HAS BEEN IN PRISON FOR 23 YEARS FOR MEMBERSHIP IN AN ILLEGAL ORGANIZATION -- THE MILITARY WING OF THE AFRICAN NATIONAL CONGRESS. IS IT POSSIBLE THAT IN THE LAND OF THE FREE AND THE BRAVE WE HAVE SO LOST OUR SENSE OF RESPONSIBILITY THAT WE MIGHT TURN OVER A NELSON MANDELA OR A BOBBY SANDS ON THE ACCUSATIONS OF ILLEGITIMATE REGIMES IT WAS THEIR MORAL DUTY TO OPPOSE?

THE BIGGEST LIE IS YET TO COME FROM MR. BRITTAN. ON JUNE 24, 1985 HE ADVISED THE AMERICAN PUBLIC THAT THESE AMENDMENTS WILL MAKE "A SIGNIFICANT CONTRIBUTION TO EFFORTS NOW BEING MADE BY WESTERN DEMOCRACIES TO COUNTER THE THREAT POSED BY INTERNATIONAL TERRORISM." THE ENGLISH USE THE WORDS "INTERNATIONAL TERRORISM" THE WAY THE ANTI-SEMITES USE "WORLD JEWRY" OR THE ANTI-CATHOLICS USE "POPERY." SUCH ARE THESE WORDS OF MR. BRITTAN. THEY HAVE NO SUBSTANCE BUT NONETHELESS ARE INTENDED TO INCITE FEAR AND HATRED. NO GOVERNMENT OR PEOPLE SAVE ENGLAND'S HAVE EVER HAD ANY REASON TO FEAR IRISH NATIONALISM OR THE MEN AND WOMEN WHO TAKE UP ARMS IN ITS CAUSE. DO NOT BE DECEIVED BY THIS BAITING!

THE EXTRADITION TREATY, IN FACT, WORKS WELL AND DOES PRECISELY WHAT IT WAS INTENDED TO DO. THE ENGLISH GOVERNMENT, HOWEVER, HAS AN INSATIABLE NEED TO DISCREDIT IRISH NATIONALISM AND TO CRIMINALIZE ITS MILITARY ACTIVITY.

THE KEY TO THIS TREACHERY IS AGAIN CONTAINED IN THESE AMENDMENTS. BY SHIFTING THE DECISION ON WHAT CONSTITUTES A POLITICAL EXCEPTION FROM THE FEDERAL COURTS TO THE DEPT. OF STATE, ENGLAND WILL INSURE THE SUCCESS OF IRISH CRIMINALIZATION. THE COURTS HAVE NO AGENDA OR REASON TO INGRATiate THEMSELVES WITH THE ENGLISH GOVERNMENT. THE DEPT. OF STATE, ON THE OTHER HAND, HAS AN AGENDA WHICH INCLUDES INTERNATIONAL BANKING, TRADE DEFICITS, PIPELINE EMBARGOS, ECONOMIC SANCTIONS, MILITARY CONTRACTS, ETC. THUS IRISH REFUGEES WILL BECOME MERE PAWNS OR TRADE ITEMS AND THE TERROR THAT BROUGHT THEM TO THESE SHORES WILL EASILY BE FORGOTTEN.

IT IS NOW 67 YEARS SINCE DEMOCRACY WAS DEFEATED IN IRELAND. IT IS WIDELY ACCEPTED THAT HAD THERE BEEN U.N. TROOPS SUPERVISING ELECTIONS IN IRELAND IN 1918 ENGLISH RULE WOULD HAVE QUIETLY ENDED. HOWEVER, SINCE THAT TIME OUR FOREIGN POLICY PRINCIPLES - THOSE ENSHRINED IN THE DECLARATION OF INDEPENDENCE AND CONSTITUTION AND FOR WHICH SO MANY OF OUR CITIZENS RISKED AND OFTEN LOST THEIR LIVES, SEEM TO BE EMPTIED OF MEANING IN THE CONTEXT OF IRELAND. THIS IS ILLUSTRATED IN ONE SIMPLE ACT. THE STATE DEPARTMENT DENIED A VISA TO GERRY ADAMS AN ELECTED MEMBER OF PARLIAMENT AND ELECTED LEADER OF THE SINN FEIN POLITICAL PARTY LEGAL IN ALL OF IRELAND. THAT DENIAL MAKES A MOCKERY OF U.S. ARMING AND FUNDING OF FREEDOM STRUGGLES WITH READY-MIX REVOLUTIONARYS AROUND THE WORLD. APARTHEID AND NAZISM COULD BE PREACHED IN EVERY CORNER OF THIS LAND BUT OUR STATE DEPT. FELT IT NECESSARY TO PROTECT ITS CITIZENS FROM IRISH NATIONALISM AND THE TRUTH OF BRITISH OCCUPATION.

IT IS OMINOUS THAT THIS MATTER SHOULD ARISE AS AMERICANS COMMEMORATE THEIR HERITAGE OF LIBERTY AND COMPASSION FOR THOSE "TEMPEST TORN AND YEARNING TO BE FREE." DO NOT TARNISH THIS CENTENNIAL CELEBRATION OF THE STATUTE OF LIBERTY BY SHAMELESSLY EMBRACING THESE AMENDMENTS.

I APPEAL TO YOU TO REJECT THESE AMENDMENTS IN SUCH A MANNER AS TO LEAVE NO DOUBT THAT WHILE AMERICA CERTAINLY WANTS PEACE FOR IRELAND, THE PRICE OF THAT PEACE WILL NOT BE THIS BETRAYAL OF THE FOUNDATIONS OF OUR FREEDOM. MORE IMPORTANTLY, I URGE YOU TO WITNESS FOR YOURSELVES THIS COLONIAL RELIC AND SPEAK TO THOSE WHO YOU MAY MAKE CRIMINALS. LISTEN TO THE ANGUISH OF THOSE WHO HAVE

LOST LOVED ONES TO PLASTIC BULLETS. WATCH A STRIP SEARCH IN THE
ARMAGH PRISON FOR WOMEN. TOUCH THE BARBED AND RAZOR WIRE WHICH
ENCIRCLES THE SIX COUNTIES LIKE A RIBBON. YOU WILL BEGIN TO
UNDERSTAND THAT ENGLISH RULE IN IRELAND IS A LIE NO TREATY
AMENDMENTS CAN TURN TO TRUTH.

* * *

Prepared Statement of Mayor Raymond L. Flynn

THANK YOU, SENATORS.

I AM PLEASED TO HAVE THIS OPPORTUNITY TO APPEAR BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE TO STATE MY OPPOSITION TO A PORTION OF A PROPOSED TREATY AMENDMENT WHICH I DEEPLY BELIEVE TO BE AGAINST OUR NATIONAL INTEREST.

STATED DIRECTLY, THE MEMBERS OF THIS COMMITTEE ARE BEING ASKED BY THE STATE DEPARTMENT AT THE BEHEST OF A FOREIGN GOVERNMENT TO REDUCE THE AUTHORITY OF OUR FEDERAL COURTS ON MATTERS RELATED TO THE EXTRADITION OF INDIVIDUALS FROM THE U.S. TO THE UNITED KINGDOM, SPECIFICALLY BY ELIMINATING THE POLITICAL EXCEPTION PROVISION IN ITS ENTIRETY FROM OUR TREATY WITH THAT GOVERNMENT.

I WOULD LIKE TO EMPHASIZE THAT BY NO MEANS WOULD I OPPOSE THE THRUST OF THE ENTIRE ~~AMENDMENT~~ ^{treaty amendment}. FOR EXAMPLE, ACTION BY CONGRESS TO STRENGTHEN OUR EFFORTS AGAINST SUCH INTERNATIONALLY OUTLAWED ACTS AS AIRLINE HIJACKING, THE KIDNAPPING OF POLITICAL OFFICIALS, ETC. WOULD BE A MUCH MORE EFFECTIVE APPROACH THAN DEALING WITH EVERY SEPARATE TREATY BETWEEN THE U.S. AND OTHER COUNTRIES.

AS YOU KNOW, BEGINNING 140 YEARS AGO IT WAS DECIDED BY OUR NATION THAT A POLITICAL EXCEPTION PROVISION WOULD BE STANDARD IN ALL TREATIES WITH FOREIGN GOVERNMENTS. MOST IMPORTANTLY, IT WAS LEFT TO AN INDEPENDENT FEDERAL JUDICIARY TO DECIDE WHICH OFFENSES QUALIFIED FOR THAT PROTECTION BASED ON THE MERITS OF EACH INDIVIDUAL CASE.

BUT NOW, WITHOUT SUFFICIENT REASON, YOU ARE BEING ASKED TO IGNORE WHAT HAS INDEED BEEN A WORKABLE AND JUST SYSTEM AND TO ESTABLISH A DANGEROUS PRECEDENT WHICH COULD WELL LEAD TO THE END OF THE POLITICAL EXCEPTION PROVISION IN TREATIES WITH OTHER NATIONS, EITHER BY THIS ADMINISTRATION OR BY FUTURE ADMINISTRATIONS.

THERE IS A WELL-KNOWN AMERICAN ADAGE WHICH STATES: "IF IT ISN'T BROKEN, DON'T FIX IT."

I BELIEVE THAT THIS ADAGE SHOULD BE PARTICULARLY USEFUL TO CONSERVATIVES AND LIBERALS ALIKE IN PROTECTING WHAT HAS BEEN A LONGSTANDING, WORKABLE, AND IMPORTANT PART OF THE FABRIC OF THE AMERICAN LEGAL SYSTEM.

THE FACT OF THE MATTER IS, A REVIEW OF THE RECORDS OF THE FEDERAL COURTS WILL SHOW YOU, INDIVIDUALS GUILTY OF SERIOUS OFFENSES HAVE INDEED BEEN EXTRADITED BY THE U.S. TO GREAT BRITAIN AND OTHER COUNTRIES ON A REGULAR BASIS. THOSE CASES ARE JUDGED ON THE MERITS BY OUR INDEPENDENT JUDICIARY WITH THE POLITICAL EXCEPTION PROVISION INCLUDED. ONLY ON FOUR OCCASIONS FOR EXAMPLE, SINCE THE END OF WORLD WAR II HAVE THE U.S. COURTS GRANTED THE POLITICAL EXEMPTION.

AS THE MAYOR OF BOSTON, A CITY KNOWN PROUDLY AS AMERICA'S "CRADLE OF LIBERTY", I TAKE PRIDE IN THE ROLE BOSTON AND MASSACHUSETTS PLAYED IN CREATING AN AMERICAN REPUBLIC BASED ON A RULE OF LAW SYSTEM, THAT HAS STOOD THE TEST OF TIME AS A PROTECTOR OF INDIVIDUAL LIBERTY.

WE HELPED CREATE A SYSTEM OF GOVERNMENT THAT WAS INDEED DIFFERENT IN TERMS OF POLITICAL AND LEGAL INSTITUTIONS FROM THAT OF BRITAIN OR ANY OTHER COUNTRY. WE HAD SOUND REASONS FOR DOING SO THEN, AND AN OBJECTIVE ANALYSIS BY THIS COMMITTEE OF THE LACK OF A LEGAL SYSTEM RESPECTING DUE PROCESS RIGHTS IN THE BRITISH CREATED AND SUPPORTED ENTITY KNOWN AS NORTHERN IRELAND, UNDERScores HOW FORTUNATE WE ARE IN OUR COUNTRY.

SUCH AN ANALYSIS, I BELIEVE, WOULD MAKE THIS COMMITTEE MORE HESITANT ABOUT ENDING A LONGSTANDING AMERICAN LEGAL PRINCIPLE, A STEP THAT WOULD LEAD THE U.S. TO EMBRACE, IN EFFECT, THE FUNDAMENTALLY FLAWED CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND.

INDEED, TO RATIFY THIS AMENDMENT WOULD MEAN THAT THE U.S. IS EFFECTIVELY INTERVENING IN THE CONFLICT IN NORTHERN IRELAND - CLEARLY ON THE BRITISH SIDE. IT WOULD ONLY CONTRIBUTE TO THE TURMOIL BECAUSE IT WOULD STRENGTHEN THE CURRENT BRITISH GOVERNMENT'S VIEW THAT THE CONFLICT IS PRIMARILY A SECURITY PROBLEM RATHER THAN A POLITICAL ONE TO BE SOLVED BY SERIOUS STRUCTURAL REFORM OF NORTHERN IRELAND, REFLECTING THE DEMOCRATIC RIGHTS OF ALL THE IRISH PEOPLE, THROUGHOUT IRELAND.

THE PAST 15 YEARS HAVE MADE IT CLEAR, WITH OR WITHOUT THIS TREATY AMENDMENT, THAT OFFICIAL REPRESSION IN NORTHERN IRELAND IS NOT THE ANSWER. THAT IS WHY ELIMINATING THE POLITICAL EXEMPTION PROVISION WOULD NOT SERVE THE INTEREST OF THE U.S., THE BRITISH, OR THE IRISH. TO RATIFY THE AMENDMENT, WOULD MEAN THAT INSTEAD OF ENGAGING IN SERIOUS REFORM THE BRITISH GOVERNMENT COULD CONTINUE WITH BUSINESS AS USUAL IN NORTHERN IRELAND.

I RECOGNIZE THAT THERE ARE MEMBERS OF THIS COMMITTEE CONTEMPLATING SUPPORT FOR THIS AMENDMENT OUT OF THE BEST OF INTENTIONS.

BUT IRONICALLY, RATHER THAN COMBATTING TERRORISM, THE ENACTMENT OF THIS AMENDMENT IN FULL WOULD HAVE THE EFFECT OF AIDING TERRORISM.

EFFORTS DIRECTED AT OPPOSING TERRORISM IN ORDER TO BE SUCCESSFUL MUST ALSO TAKE INTO ACCOUNT THE TERRORISM OF THE FORCES OF STATE, AS WELL AS THE TERROR OF PARAMILITARY GROUPS. BOTH FORMS OF TERRORISM MUST STAND CONDEMNED BY OUR GOVERNMENT, AND NONE MUST BE GIVEN QUARTER, NO MATTER WHOM THE PERPETRATOR OR EXCUSE RENDERED.

ACCORDINGLY, A SIGNIFICANT BODY OF EVIDENCE IS AVAILABLE TO THIS COMMITTEE DEMONSTRATING THAT THE VIOLENCE BY THE BRITISH SECURITY FORCES AGAINST UNARMED CATHOLICS IN NORTHERN IRELAND, ALONG WITH THE DENIAL OF DUE PROCESS RIGHTS, AMOUNT TO A VERY REAL FORM OF OFFICIAL TERROR, AS WELL AS AN ONGOING SOURCE OF CATHOLIC ALIENATION FROM THE INSTITUTIONAL STRUCTURES OF NORTHERN IRELAND.

THE DENIAL IN NORTHERN IRELAND OF TRIALS BY JURY, THE EXTENSIVE USE OF PAID INFORMANTS, THE ABSENCE OF PROBABLE CAUSE PROCEEDINGS, ADDED TO THE NUMBER OF UNARMED CATHOLICS KILLED BY BRITISH SECURITY FORCES DOES NOT SERVE TO PRESENT A SYSTEM BASED ON A RULE OF LAW AS WE KNOW IT, AND AS THE U.S. STATE DEPARTMENT HAS INACCURATELY CLAIMED.

INDEED, I RESPECTFULLY SUGGEST THAT A REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND SHOULD BE UNDERTAKEN BY THIS COMMITTEE BEFORE A VOTE ON THE PROPOSED AMENDMENT IS CONSIDERED.

FOR THE U.S. SENATE TO EVEN INDIRECTLY SUPPORT THE PERPETUATION OF A LEGAL SYSTEM IN NORTHERN IRELAND DENYING DUE PROCESS OF LAW THROUGH THE APPROVAL OF THIS PROPOSED AMENDMENT IN ITS ENTIRETY, WOULD ONLY CONTRIBUTE TO THE CONFLICT IN NORTHERN IRELAND. JUST AS IMPORTANTLY, THIS AMENDMENT WOULD ABROGATE A LONGSTANDING AND WORKABLE U.S. LEGAL PRINCIPLE ON EXTRADITION.

THIS ^{Provision} ~~amendment~~ IS BOTH UNNECESSARY AND AN AFFRONT TO OUR AMERICAN REPUBLIC.

THANK YOU.

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Prepared Statement of Representative Peter W. Rodino, Jr.

MR. CHAIRMAN, I AM PLEASED TO PRESENT MY VIEWS ON THE PROPOSED SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM.

AT THE OUTSET, LET ME ASSURE YOU THAT I SHARE THE ADMINISTRATION'S BELIEF THAT STRONG MEASURES MUST BE TAKEN TO COMBAT THE RISE IN TERRORISM. AN IMPORTANT DUTY OF ANY NATION IS TO PROTECT ITS CITIZENS FROM BODILY HARM. EVERY AMERICAN, ESPECIALLY THOSE OF US IN GOVERNMENT, FEEL GREAT OUTRAGE AND A SENSE OF HELPLESSNESS WHEN VIOLENT ACTS, LIKE THE RECENT HIJACKING OF THE TWA JET LINER, ARE PERPETRATED AGAINST INNOCENT INDIVIDUALS. WE WILL NEVER BE ABLE TO ELIMINATE SUCH HEINOUS CRIMES AGAINST MANKIND UNLESS TERRORISTS REALIZE THAT THEIR ACTS OF VIOLENCE AGAINST INNOCENT VICTIMS WILL NOT GO UNPUNISHED.

HAVING SAID THAT, HOWEVER, I WANT TO RAISE SEVERAL CONCERNS ABOUT THE PROPOSED TREATY NOW UNDER CONSIDERATION BY THIS COMMITTEE. ALTHOUGH SUPPORTERS OF THE TREATY MAINTAIN THAT ITS PRIMARY GOAL IS TO COMBAT INTERNATIONAL TERRORISM, IT, IN FACT, GOES MUCH FURTHER. AS CURRENTLY DRAFTED, THE TREATY WOULD EFFECTIVELY ELIMINATE THE "POLITICAL OFFENSE EXCEPTION", WHICH HAS BEEN A PART OF AMERICAN EXTRADITION PRACTICE AND

CASE LAW FOR OVER 100 YEARS. UNDER THIS EXCEPTION, AN INDIVIDUAL WHOSE EXTRADITION IS REQUESTED BY A FOREIGN STATE IS ABLE TO CLAIM IN COURT THAT THE ACT HE COMMITTED WAS POLITICALLY MOTIVATED AND SHOULD NOT BE CONSIDERED AN EXTRADITABLE CRIME. IF THE COURT FINDS HIS CLAIM TO BE VALID, HE IS NOT EXTRADITED.

OUR NATION CAME INTO EXISTENCE THROUGH REVOLUTION AGAINST A POLITICAL SYSTEM DETERMINED BY OUR FOUNDING FATHERS AND MOTHERS TO BE UNJUST. TRADITIONALLY, WE HAVE BEEN VIEWED AS SYMPATHETIC TOWARD OPPRESSED PEOPLES AROUND THE WORLD AND AS A HAVEN FOR POLITICAL REFUGEES. THUS, THE POLITICAL OFFENSE EXCEPTION HAS SERVED US WELL AND SHOULD NOT BE CHANGED WITHOUT CAREFUL CONSIDERATION BY BOTH BODIES OF CONGRESS.

CONTRARY TO THIS STANDARD, HOWEVER, THE SUPPLEMENTARY TREATY -- DRAFTED BY THE EXECUTIVE BRANCH AND SUBJECT TO RATIFICATION BY THE SENATE ALONE -- MAKES A MAJOR CHANGE IN THE POLITICAL OFFENSE EXCEPTION BY EXEMPTING A DETAILED LAUNDRY LIST OF ACTIONS FROM THAT EXCEPTION. ALTHOUGH THE PURPORTED AIM OF THE TREATY IS TO ADDRESS THE PROBLEMS ASSOCIATED WITH INTERNATIONAL TERRORIST ACTIVITY, THE EXCLUSIONS FROM THE POLITICAL OFFENSE EXCEPTION GO FAR BEYOND THOSE DEEDS NORMALLY CONSIDERED TO BE THE WORK OF TERRORISTS -- THE HIJACKING OF AIRPLANES AND THE TAKING OF HOSTAGES, FOR EXAMPLE -- TO INCLUDE ORDINARY ACTS OF VIOLENCE, DESTRUCTION OF PROPERTY, AND POSSESSION OF FIREARMS. IN ESSENCE, THEN, RATIFICATION OF

THE TREATY WOULD PREVENT THE COURTS FROM CONSIDERING ANY ACT OF VIOLENCE TO BE A POLITICAL OFFENSE EVEN IF THERE WERE MITIGATING CIRCUMSTANCES. THUS, THE DECISION ABOUT WHETHER TO EXTRADITE AN INDIVIDUAL WOULD BE REMOVED FROM THE COURTS AND WOULD BE ENTIRELY WITHIN THE DISCRETION OF THE EXECUTIVE BRANCH. THE DANGER WITH THIS ARRANGEMENT IS THAT DETERMINATIONS REGARDING EXTRADITION COULD BE UNDULY INFLUENCED BY INTERNATIONAL POLITICAL CONSIDERATIONS.

THIS DRASTIC CHANGE IN THE POLITICAL OFFENSE EXCEPTION WOULD APPLY ONLY TO THE UNITED KINGDOM -- "A STABLE DEMOCRACY" WITH A JUDICIAL SYSTEM THAT "PROVIDES FAIR TREATMENT," AS THE TREATY'S PROPONENTS ARE QUICK TO POINT OUT. I WILL NOT DISPUTE THAT CLAIM TODAY. YOU HAVE ALREADY HEARD TESTIMONY BY INDIVIDUALS MORE KNOWLEDGEABLE THAN I THAT THE SYSTEM OF JUSTICE IN NORTHERN IRELAND DOES NOT AFFORD THE MEMBERS OF THE PROVISIONAL IRISH REPUBLICAN ARMY THE PROTECTIONS THAT OUGHT TO BE GUARANTEED BY A "FAIR" JUDICIAL SYSTEM. THE HEATED DEBATE SURROUNDING THIS ISSUE MERELY EMPHASIZES ONE OF THE DIFFICULTIES THAT WILL OCCUR IF CHANGES IN OUR EXTRADITION LAW ARE MADE ON A TREATY-BY-TREATY BASIS. DO WE REALLY WANT TO BE FORCED INTO JUDGING THE POLITICAL AND LEGAL SYSTEMS OF OUR FRIENDS AND ALLIES?

I STRONGLY BELIEVE THAT CHANGES IN OUR EXTRADITION POLICY SHOULD NOT BE MADE ON A PIECEMEAL BASIS WITH INDIVIDUAL

COUNTRIES. TRADITIONALLY, ALL NATIONS WITH WHICH WE HAVE HAD EXTRADITION TREATIES HAVE BEEN SUBJECT TO THE SAME POLICY. UNDER THAT POLICY, WE HAVE BEEN ABLE TO REMAIN NEUTRAL AND HAVE NOT BEEN FORCED INTO TAKING SIDES ON INTERNAL POLITICAL DISPUTES. RATIFICATION OF THE PROPOSED TREATY WITH THE UNITED KINGDOM COULD VERY WELL LEAD TO REQUESTS FROM OTHER COUNTRIES TO REWRITE THEIR EXTRADITION TREATIES, PUTTING US IN THE DIFFICULT POSITION OF DETERMINING WHICH OF OUR FRIENDS AND ALLIES HAVE DEMOCRATIC GOVERNMENTS AND JUST LEGAL SYSTEMS.

MOREOVER, POLITICAL SITUATIONS CAN CHANGE QUICKLY; FRIENDS AND ALLIES HAVE BECOME FOES ALMOST OVERNIGHT, AND EACH NEW ADMINISTRATION IN OUR COUNTRY BRINGS WITH IT ITS OWN DEFINITION OF "FRIEND" AND "ALLY". FINALLY, WE MUST GUARD AGAINST THE POSSIBILITY OF OUR EXTRADITION POLICIES BEING USED AS A "BARGAINING CHIP" IN INTERNATIONAL NEGOTIATIONS ON A VARIETY OF ISSUES. THE POLITICAL OFFENSE EXCEPTION, SO LONG A PART OF OF EXTRADITION PRACTICE, MUST CONTINUE TO BE BASED ON FUNDAMENTAL LEGAL DOCTRINE AND NOT ON THE PREVAILING POLITICAL WINDS IN THE INTERNATIONAL COMMUNITY.

HAVING RAISED THESE OBJECTIONS ABOUT THE PROPOSED TREATY, I DO NOT WANT TO LEAVE YOU WITH THE IMPRESSION THAT NO CHANGES ARE NEEDED IN OUR EXTRADITION LAW. I AGREE THAT THE POLITICAL OFFENSE EXCEPTION AS WELL AS OTHER PARTS OF THAT LAW NEED MODERNIZATION. HOWEVER, IN OUR HASTE TO ENSURE PUNISHMENT OF

TERRORISTS WHO COMMIT WANTON ACTS OF VIOLENCE WITHOUT REGARD FOR INNOCENT LIFE, WE MUST TAKE CARE NOT TO ELIMINATE THE PROTECTIONS CURRENTLY AFFORDED BY THE POLITICAL OFFENSE EXCEPTION TO INDIVIDUALS WHO HAVE JUSTIFIABLY REVOLTED AGAINST AN UNFAIR POLITICAL SYSTEM. THE ONLY WAY TO ENSURE BOTH RESULTS IS THROUGH THE CAREFUL DEBATE OF THE LEGISLATIVE PROCESS.

CONGRESS BEGAN THIS PROCESS NEARLY FIVE YEARS AGO WITH THE INTRODUCTION OF THE EXTRADITION ACT OF 1981. THE SENATE FOREIGN RELATIONS AND THE HOUSE FOREIGN AFFAIRS COMMITTEES AND THE SENATE AND HOUSE JUDICIARY COMMITTEES SPENT MANY HOURS REFINING THIS PROPOSAL, WHICH CULMINATED IN THE EXTRADITION ACT OF 1984. ALTHOUGH MY FRIEND AND COLLEAGUE, MR. HUGHES, WHO SERVES AS CHAIRMAN OF THE CRIME SUBCOMMITTEE, WORKED DILIGENTLY TO SEE THAT THIS PROPOSAL WAS ENACTED LAST SESSION, TIME CONSTRAINTS AS THE 98TH CONGRESS DREW TO A CLOSE PREVENTED US FROM ACHIEVING THAT GOAL.

OUR WORK TO REVISE EXISTING EXTRADITION LAW IS ALMOST COMPLETE AND WILL BE A TOP PRIORITY WITH THE HOUSE JUDICIARY COMMITTEE NEXT SESSION. THUS, I STRONGLY URGE YOU TO REJECT THE SUPPLEMENTARY TREATY AND TO WORK WITH ME AND WITH OUR COLLEAGUES IN CONGRESS TO FINISH PROMPTLY THE TASK BEGUN ALMOST FIVE YEARS AGO -- REVISION OF OUR EXTRADITION LAW ON A COMPREHENSIVE, RATHER THAN PIECEMEAL, BASIS.

STATEMENT

OF

RICHARD P. LAWLOR, ESQ.
JEANNE CLARIZIO, ESQ.
MICHAEL GRAHAM, ESQ.

IRISH AMERICAN UNITY CONFERENCE
STATE OF CONNECTICUT

CONCERNING

1985 SUPPLEMENTARY TREATY TO
THE 1972 UNITED STATES-UNITED KINGDOM
EXTRADITION TREATY

September 18, 1985

Honorable Chairman and Members of the Senate Foreign Relations Committee:

On August 1, 1985, the Administration, through the testimony of Abraham D. Sofaer, Legal Adviser to the State Department, and D. Lowell Jensen, Deputy Attorney General of the United States Justice Department, sought ratification of the proposed United States and United Kingdom Extradition Treaty. Their conclusion was in fact based upon presumptions fundamentally in error. The danger presented by ratification is therefore compounded.

Very few of us have any difficulty in recognizing human rights abuses committed by clearly established repressive regimes. Examples of countries with little or no traditions of democratic government committing such abuses abound: Libya, South Africa, etc., etc., etc. Clearly recognized, abuses in these countries are easily denounced. In the absence of a tradition of democratic government, such abuses are easily enacted as government procedure.

The obverse to human rights abuses in non-democratic countries becomes therefore enticingly easy to accept: that democracy necessarily ensures that such abuses do not take place. In the case of a country closely linked to our own in tradition, culture, language, law and history, the urge to believe that the nature of that country's democracy is equal to our own, and that concern for the dignity of each human being ranks as high in the moral value system of that country, may become overwhelming. The result may be that assumptions are accepted without examination of their foundations and that important questions go unasked.

Comments made in support of ratification on August 1, 1985, are classic examples of uninformed belief, myth being accepted despite the evidence of cold harsh facts in abundance. Mr. Sofaer in his remarks said that "with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." He stated further that "violence is therefore not the result of a lack of opportunity to engage in the democratic process."

The long and ignominious history of British interference in Irish affairs, especially with regard to the past sixty odd years of enforced partition against the overwhelming desire of Irish people (80% opposed it in the only election ever held on the question in 1918), is a virtual study in tyranny, in direct opposition to the remarks of Mr. Sofaer. Britain's rule in Ireland is neither democratic (it is direct colonial rule), nor is the judicial system fair (it is in practice and procedure biased martial law).

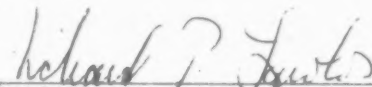
To amplify on the use of internment, gerrymander, assassination squads, regular house wreckings and daily harassment, strip searches, juryless courts with Orange judges and bribed, brainwashed witnesses, plastic bullets, government-sanctioned torture, official discrimination in housing, employment and political and civil affairs would take great amounts of this Committee's time but could be documented in detail according to any standard of proof so required by the Committee.

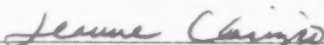
Our concern and plea to the Committee is therefore this: peel away the thin veneer of democracy which is the figment of propaganda and you will find a regime which is among the world's worst respectors of citizens it claims are its own and--because it portrays itself as a democratic nation in accord with American tradition while it simultaneously practices barbarity--is among the most dangerous of world governments.

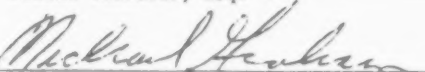
To oppose this regime is in exact accord with all American history. To abandon refuge to those who do so is in direct contravention of more than one hundred years of United States law, tradition and United States-United Kingdom relations.

Our request for defeat of this treaty is not made in a vacuum. Both because of many years of study of this issue and because of personal presence in British occupied Ireland (Lawlor led a delegation of Americans the past two summers there, one of which delegations was brutally attacked by British forces, resulting in death and serious injury, which brought forth no statement of concern by the United States Administration; Graham has visited British-occupied Ireland on several occasions on behalf of the National Lawyers' Guild; Clarizio has also visited the area on a fact-finding tour), many of us have had ample reason to apply American standards of justice and democracy to the reality of British-occupied Ireland. Based upon our observations and upon the logical conclusions drawn therefrom, we feel very strongly that the United States ought not to allow Britain to shame the concept of democracy the world over by hoodwinking the world's greatest democracy. Let them do their own dirty work, and let us then stand before the world with Irish aspiration for freedom. When the scaffold is removed next year, let us with pride truly let our Statue of Liberty shine forth the beacon of freedom.

Thank you for your consideration of our views.


Richard P. Lawlor, Esq.


Jeanne Clarizio, Esq.


Michael Graham, Esq.

Prepared Statement of Father James Joyce

My name is Father James Joyce. I am based in New York City, but for approximately three and one-half years out of the last ten, in segments of various lengths, I have worked in Ireland, both north and south on projects of peace and reconciliation. My most recent experience there was this past July.

I want to make it clear, however, that I offer this testimony as a private individual, not in affiliation with any political party or position on either side of the Atlantic, nor do I express the position of any religious order or Church body. This testimony is not to be misinterpreted as support for any paramilitary group or government body, neither is it on behalf of any caucus, association, or aid organization. I hope you will listen to what I feel is a sensible argument against the suggested changes in the treaty provisions for extradition from this country to Britain.

The proposed changes (eliminating what is known as the political offense clause) would, to my mind be counterproductive to both British and American interests, and counterproductive to the promotion of peace in that area.

Especially because of the proposed retroactivity, people would be liable to extradition who have remained out of the conflict for a number of years. Great bitterness could be engendered by attempted extradition and imprisonment of people who believed they were defending their family and neighborhood or were defending what they considered their national or civil rights.

These are not international terrorists in any sense that would have them commit violent acts for the sake of any ideology in any other place outside of the Irish-English context. Please do not misinterpret what I say as defending or approving of violent activity.

Sadly, so many participants in the violence were otherwise completely law-abiding until they saw the results of violence -- sometimes by auxiliary police or security people, often by people of the other socio-political-religious community -- perpetrated against people they knew or cared about. To identify the body of a relative or friend who has been blown up, shot or stabbed repeatedly, or tortured can do awful things to one's mind and consciousness causing a desire for revenging wrongs or exalating violence that, though truly lamentable, has nothing to do with "international terrorism."

To extradite these people, from either socio-political-religious background, would mean their imprisonment in N. Ireland and eventual release in their home towns only to put them back into the conflict situation, having become more bitter and thus more likely to engage in violence, rather than less likely to do so as would be the case if they were allowed to remain in this country.

Neither could I imagine it to be in the U.S. interest to have such people in immigrant detention centers or courts here feeling that an injustice was being done to them and perhaps protesting it, as prisoners in N. Ireland have done in the past over their political status with tragic results. If a person has violated U.S. firearms or explosive laws, U.S. courts can deal with that, if not, it would be safer and saner for the particular person who may have previously been engaged in the Irish conflict to remain here at no danger to anyone on either side of the ocean.

I also fail to see how U.S. interests would be served if this country were to be put into the position of seeming to be supportive of legal actions which, if carried out in this country, would be highly questionable as to their adherence to our constitutional values and legal processes. I point out that the terms would seem to be in the nature of applying ex post facto sanctions because of the retroactive conditions. Other countries have very different rules of evidence and corroboration of testimony. In N. Ireland the courts themselves are presently calling into question a number of their own convictions. What is considered to be a crime, a criminal circumstance, or evidence to support a case -- such as a police officer's testimony that someone belongs to what is classified as "an illegal organization" -- is, of course, very different in countries other than our own, and the spirit of them might run quite counter to the cherished constitutional and legal values of this country. Can anyone really say that to approve treaty provisions which would, at the very least, seem to run counter to our Constitution be in the U.S. interest?

Nor can it be in the interest of people of Britain or N. Ireland if it works to put people "on the ground," whether soldiers or citizens, in more jeopardy or danger of violence. For the cycle of violence to be broken, somewhere there must be an intervention where the choice of one contending faction is a deliberate choice not to seek vengeance. I would ask again, how would the extradition of people of any political or religious persuasion who have been living in peace in this country to face trial and imprisonment in the volatile situation of their own country be in the interest of those people on the ground who have suffered so much already?

There may be aspects of the legal status for these people to remain in the U.S. and out of the conflict which will have to be looked at, but if there is a will to work this out there will be a way. There cannot be a fear of their ideas because that again would be very contrary to our constitutional values. It is my opinion that it should not matter to those who are trying to work out solutions to the very real problems and divisions what Americans who have not been there think of the situation anyway. As I have said before, if there is a question of violation of U.S. laws regarding weapons or any matter of that nature, then the courts in the U.S. must have your confidence to deal with the issues. Anything less would show a lack of belief in our judicial system and process.

In the interest of truly working toward the cessation of violence from whatever source, and as a humanitarian concern, I urge you to resist these newly proposed treaty conditions. For the cause of peace and reconciliation I ask you to cherish the spirit of our constitutional guarantees, and apply plain common sense to your analysis of what would result from such extraditions. What is proposed would in fact give a cause for worsening the violent situation that the British and the Irish face. I hope that the appropriate American action in the case of the extradition clause of the treaty be both sensible and compassionate for the sake of the people on the ground in Britain and Ireland who are suffering from so much violence.

For all these reasons, I urge you to oppose the suggested elimination of the political offense clause. Thank you.

STATEMENT ON BEHALF OF THE AMERICAN COMMITTEE ON AFRICA,
 THE EPISCOPAL CHURCHPEOPLE FOR A FREE SOUTHERN AFRICA,
 AND NATIONAL NAMIBIA CONCERNS
 CONCERNING THE PROPOSED SUPPLEMENTAL TREATY OF
 EXTRADITION WITH THE UNITED KINGDOM

This statement is submitted on behalf of the American Committee on Africa, Inc. (ACOA), the Episcopal Churchpeople for a Free Southern Africa (ECSA), and National Namibia Concerns.

ACOA is a not-for-profit corporation organized under the laws of New York State. For over 30 years it has worked against apartheid and for self-determination and independence throughout Africa. It is a prime source of information on developments in southern Africa and frequently testifies before congressional committees and the United Nations. Its associated organization, the Africa Fund, produces educational materials on Africa and administers a program of humanitarian assistance for refugees from southern Africa.

ECSA was formed in 1956 (as the Episcopal Churchmen for South Africa) under the New York Not-for-Profit Corporations Law. It represents concerned Episcopalians, as well as members of other denominations, in all states of the Union and in Canada in matters that affect southern Africa directly or indirectly, particularly human rights issues. It produces a semi-monthly round-up of major news items on southern Africa for a network of concerned persons.

National Namibia Concerns is a non-profit organization based in Denver, Colorado. It grew out of the Namibia Concerns Committee at Wartburg (Lutheran) Seminary in Dubuque, Iowa, to which most Lutheran clergy from Namibia have come to study in recent years. An ecumenical organization, National Namibia Concerns provides timely information about Namibia to church and lay groups throughout the United States as well as educational assistance for Namibians.

ACOA, ECSA, and National Namibia Concerns all oppose the proposed supplemental treaty.

We believe that, in the first instance, the changes the proposed treaty would make in the present US-UK treaty constitute a threat to liberty generally and to our American heritage of protection and refuge for victims of oppression.

We further believe that approval of the proposed supplemental treaty would set a precedent dangerous to the people of southern Africa, for whose welfare we have a special concern. It would make likely the adoption of similar changes in the US-South African extradition treaty. Such changes would jeopardize all South Africans and Namibians-- both black and white-- in this country who had ever participated in the struggle to end minority rule in South Africa or to bring an end to Pretoria's illegal occupation of Namibia.

Threat to liberty generally

The present US-UK treaty bars extradition of persons accused of crimes-- violent or non-violent-- which are of a political character. Thus it protects modern-day George Washingtons as well as the equivalents of the Lexington Minute-men, who ambushed the British Redcoats, firing at them from "behind each fence and farmyard wall."

The proposed treaty would reverse this policy by disallowing the political crimes defense whenever the alleged crime involves any violence and even in some cases when it does not (such as conspiracy). Its terms are broad and vague. In some instances they could even be construed to require the return of dissidents for acts that most Americans would consider minor or technical offenses or possibly no crime at all. If it had been in effect at the time of our Revolution, American foot-soldiers as well as their leaders would have been deemed extraditable.

We believe that the liberty of all Americans is affected if any extradition treaty to which the United States is a party permits the extradition of persons playing the same role in their countries today as did the many political refugees who received protection from their oppressors in the US or elsewhere during the last century and a half. Among such refugees are: Simon Bolivar, who survived to liberate much of Latin America; Louis Kossuth, leader of the unsuccessful Hungarian uprising of 1848; Giuseppe Mazzini and Giuseppe Garibaldi, who returned home to help found the modern Italian state; and Eamon de Valera, who became prime minister of the Irish Free State.

We reject the rationalization that the proposed changes are needed to curb terrorism.

Despite the exception for political crimes, present extradition treaties permit the extradition of real terrorists: When a political crimes defense is raised against extradition, the courts-- which are our most neutral fact-finders-- must first determine whether the alleged crime was in fact political rather than personal. If it was political, they then examine whether the alleged criminal is nevertheless extraditable under any law or multilateral

treaty, such as those protecting heads of state against assassination or civilian aircraft against sabotage or hijacking.(1) Finally the courts consider whether the crime, even if political, was so wantonly cruel or barbaric that the alleged perpetrator should not be protected by the political crimes defense.(2)

Real terrorists cannot pass these tests. But persons who are an embarrassment or a reproach to the government seeking their extradition may well pass. If our own administration has close links to the government requesting extradition, it may be tempted to refer to such persons as "terrorists."

Calling a person a "terrorist" does not, however, make him or her one. Embarrassment is not a valid ground for extradition.

We are alarmed by the fact that gutting the political crimes defense in any extradition treaty-- which, by constitutional definition, is a part of the law of the land-- will force us, for the foreseeable future, to return any and every rebel against our treaty partner, regardless of the circumstances. We will be locked into a system little different from that of the unholy alliance of Russia, Prussia, and Austria, which the children of the American Revolution so justly abhorred.

We believe that the liberty of all Americans will be diminished if we contract by treaty to return defeated rebels to "victors' justice"-- a euphemism for treatment that is seldom just and never compassionate.

1. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (effective Feb. 22, 1977); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (effective Jan. 26, 1973); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S. T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

2. See, e.g., *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981).

Dangers to South Africans and Namibians

The three organizations joining in this statement believe that the proposed treaty constitutes a serious potential threat to South Africans and Namibians in the United States in that they will, by an all too easily anticipated sequence of events, become extraditable to an increasingly repressive and vengeful South African government.

Specifically, we fear that if the proposed US-UK treaty is approved, it will be followed by a similar revision to the US-South African extradition treaty. We are convinced that this fear is neither fanciful nor unfounded.

All the evidence available to us indicates that the Reagan administration intends to follow up the revision of the US-UK treaty by revising other extradition treaties in the same way. We understand that Judge Sofaer testified to this effect. We know that in 1981 the administration sought approval of an extradition treaty with the Philippines that would have required the delivery of that government's opponents into its hands regardless of the political nature of their alleged offense. During its first term the administration also tried, by general legislation --which the Congress wisely rejected--, to amend all extradition treaties so as to effectively abolish the political crimes defense.

It may be, as has been speculated, that the administration would propose revising extradition treaties with our American "friends and allies" only. But the statements and conduct of the Reagan administration strongly suggest that it includes South Africa in that category.

We note, for example, that the administration has gone beyond merely intimating that it will veto the Anti-Apartheid bill (now before the Senate) that imposes limited sanctions against South Africa: It is reported to have created a team to try to convince the American people that its policy of "constructive engagement" is successful, despite increasing repression, and that South Africa is advancing towards racial harmony, despite the worsening violence and bloodshed. We assume that the Rev. Jerry Falwell is an advance man for that propaganda team.

We are also aware of a sudden emphasis by members of the administration on American dependence on South African strategic minerals. They continue to indulge in this scare tactic despite the conclusions of a conservative study group that the alleged dependence is grossly exaggerated and can be met by simple conservation, substitution, and stockpiling

policies. (3)

Further we note that State Department reports on human rights in South African and Namibia omit many serious complaints while inordinately praising South Africa's "independent" judiciary. The reports ignore the key fact that most repressive legislation authorizes trial of offenders by magistrates, who are civil servants on the Justice Department's payroll. As a result, the prosecutor can determine the most favorable court in which to bring trial, so as to avoid any "independent" jurists. The reports also downplay the fact that, under the South African principle of parliamentary (now cabinet?) supremacy, even the most independent jurist cannot invalidate legislation that is intentionally repressive or discriminatory.

If, as we fear, the present US-South Africa extradition treaty is revised to eliminate the political crimes defense, the results will be tragic for both South Africans and Namibians in the United States.

(The present US-South Africa extradition treaty was made applicable to the then Mandated Territory of South West Africa (now Namibia) when it was drafted. As far as is known, the provision applying it to the Territory has not been abrogated despite the 1971 ruling of the International Court of Justice. (4) A "supplementary" treaty would therefore probably apply to Namibia also in the absence of exclusionary language.)

It is difficult to estimate with reasonable accuracy the number of South Africans and Namibians presently in this country. The vast majority of them are probably students or other temporary residents. If the US-South African extradition treaty is changed as proposed for the US-UK treaty, a majority of the students will probably be extraditable. Except for those selected by the South African government, most of the students have undoubtedly at least thrown a stone at a South African soldier or policeman: a political protest-- and an extraditable offense if the treaty

3. South Africa: Time Running Out. Study Commission on U.S. Policy Toward Southern Africa (U. Cal. Press 1981), ch. 14.

4. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 122.

It should be noted that on 17 June 1985 the South African government installed in Namibia an "interim government," all of whose members were chosen by Pretoria. Control of foreign affairs remains vested in Pretoria.

is revised. Students who come from refugee camps have probably engaged in guerrilla warfare while awaiting a precious scholarship, mortaring a South African army base in the northern Transvaal or northern Namibia or bombing a power pylon-- again extraditable offenses under a revised treaty.

The new Anti-Apartheid bill before the Senate contains a provision for additional educational aid for black South Africans. If the US-South African extradition treaty is revised, will the beneficiaries of Congress' concern be liable to extradition as fast as they reach these shores?

To be sure, even if the treaty is revised, it is still possible that an administration bureaucrat might decide not to respond to a South African demand for extradition of a student who had, for example, helped burn down a government-run liquor store when he was a daring 12-year old. But we do not believe that it is acceptable policy to leave mitigation of strict treaty terms to the whim of even a sympathetic senior administration official. And there is no guarantee that the person assigned to vetting extradition requests will be sympathetic.

Even in the best of circumstances we believe that a decision to refuse extradition would occur only rarely, regardless of the equities: We have watched with dismay the present administration thwart the liberation of the entire Territory of Namibia-- blasting the hopes of a million and a half people-- in order to get rid of Cuban troops in Angola. Consequently, we find it difficult to believe that the same administration would block the extradition of a single individual, whatever the merits of his case, if interests of state would be enhanced by his sacrifice.

We have also noted the ostensible even-handedness with which the Reagan administration has condemned all violence in southern Africa: violence by the disenfranchised oppressed majority as well as by their oppressors; violence by Namibians who seek to end the illegal occupation of their country as well as by the army of occupation. An administration that can draw no distinctions in such cases is unlikely to oppose a "friendly" treaty partner's demand for the return of a political dissident.

Finally, the advice recently given to our government by the Joint Chiefs of Staff only reenforces our conclusion: According to the press, (5) the Joint Chiefs recommended that the government not ratify the 1977 protocols to the 1949 Geneva Conventions, which regulate the treatment of prisoners of war and of non-combatants in war zones. (The protocols would extend the Conventions' protections, which apply in

5. New York Times, 22 July 1985.

international conflicts only, to civil wars and wars of national liberation.) The Joint Chiefs are reported to have objected to extending the Conventions' provisions to wars of national liberation, making specific reference to the African National Congress (ANC) of South Africa. If this recommendation is adopted, there will be even less hope for any administrative refusal to extradite under a revised treaty.

We must add that we find the Joint Chiefs' advice particularly distressing in view of the contrast between the positions taken by Pretoria and by the two liberation movements fighting South Africa, e.g., the ANC and the South West Africa People's Organization (SWAPO) of Namibia. South Africa has refused to ratify the protocols. The ANC and SWAPO, on the other hand, have deposited formal Declarations of Intent in Geneva that they will abide by the Geneva Conventions and the protocols. (6)

Summary

Our organizations believe that approval of the proposed supplementary treaty would reverse a long and honorable history of protecting refugees and rebels from victors' justice and, by restricting the liberty of others, thereby also diminish the liberty of Americans. We further believe that approval of the proposed revisions is likely to lead to similar revisions of the US-South African extradition treaty, endangering thousands of South Africans and Namibians in this country.

We therefore urge the Committee not to approve the proposed supplementary US-UK extradition treaty.

6. See New African, Jan. 1981, p.21, and Observer (London), 7 March 1982, p. 16. It should be noted that in determining whether an offense is political, a court may take into account whether a rebel group abides by the laws of war relating to non-combatants. See In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 12 Dec. 1984).



Tom Kieran Egan — Director

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Room SD-419
United States Senate

10 AM -- 18 September 1985

Testimony before

FOREIGN RELATIONS COMMITTEE HEARINGS

Supplementary Extradition Treaty

between

United States and Britain

Document 99-8

Signed 25 June 1985

Delivered by TOM KIERAN EGAN of Vermont

Mr. Chairman--Members of the Committee:

Patrick Henry began his historic speech saying --

"There is no time for ceremony --"

With this precedent, I'll not express my THANKS to you
as fully as I'd wish.

I come to you today as the oldest son,

of an Irishman who showed his gratitude -

to the country that took him to its bosom -

by shouting - from the tailgate of a truck

on the streets of New York City

and sold so many WW I L-L Bonds

that CONGRESS voted him. a special medal.

He - and my Irish mother - passed on to their 7 sons +
1 daughter -

their fierce love for America -

Of course, I have deep respect for the Irish

who had to leave their homeland -

because of British interference in Irish affairs...

* Like those who signed our Declaration of Independence.

* Like those who were such a large part of GW's Army.

* The list is too long for my limited time!

I say this to explain -- that it was my interest --

in Ireland's enormous contribution to America -

that led to a life-time study of AM hist // IR hist
ENGLISH history

And - from my familiarity with the histories of these 3 Counties -

INDIGNATION (at Britain's latest ploy)

is a knee-jerk reaction

as natural as breath itself!

From my historical perspective, Dear Senators --

this is a SORDID AFFAIR!

One can't read Tom Paine and Patrick Henry --

without noting the close parallel

between the Revolutionary Rebels in America -

and the handful of Irish - in British Occupied Ireland today!

One can't read the admonition

in George Washington's "Farewell Address" -

without hearing the ECHO in this room today:

"The nation which indulges toward another / an habitual hate
or habitual fondness / is, in some degree, a slave. It is a
slave to its animosity -- or to its affection -- either of which
is sufficient -- to lead it astray -- from its duty and its interest

Although I'm very active with Historical Societies --

(Indeed, I was honored recently by the Am Soc for State & Local
History for (quote) "Sustained leadership - in a continuing series
of historical appreciation projects - with Reg & Nat Significance."

I do not speak for any society!

No - I'd rather think that I'm speaking for Individual Americans
in so many corners & cross-roads of our broad nation

who KNOW -- and CHERISH -- the UNIQUENESS of America
over any other nation --
 who are proud of our honest concern
for peoples of other nations --
 our demonstrated generosity --
yes, even our naive innocence --
 and our PRECIOUS TRADITIONS (Brief compared to older nations)
 but SO VERY SPECIAL -- that NOT ONE TRADITION
 (Not even a CLAUSE of one)
 should be ABORTED because a Foreign Nation sees an Opportunity
 in a recent combination of unfortunate happenstances!

And that's what made me come down here from Vermont --
 hoping you'd find time to let me speak.

I want to express my Indignation -- that England --
 (with its really Shabby history)
 should suggest a resemblance to our United States!

Yes, we have the Same Language & Some Similar Place-Names--
 but the real resemblance stops right there!

I doubt that they share Spy-Secrets -----
 and that phrase "Our Special Ally"
 is a clever Semantic!

HISTORY(even recent History) makes them
 "Our Special Beneficiary" !

I make these blunt statements

because Judge Abraham Sofaer (in language just as blunt)
makes English "Similarity to America" ---

the MAJOR PREMISE of his case!

QUOTE: (And he uses this comparison twice!)

"The Political Offense Exception has no place
in Extradition Treaties

between STABLE DEMOCRACIES."

(STABLE DEMOCRACIES!)

He suggests a Stable Democracy in Britain --

the way we understand it in the United States!!

NO! NO!

LET'S LOOK AT IT ----

(H O L D U P M A P)

Britain claims that this ARTIFICIAL STATELET --

this ABSURD, PREPOSTEROUS ARRANGEMENT ---

is really part of Britain!

Well, I was there 4 months ago -- and what did I see?

*** First, I went through a bristling, armed check-point -

(Is this the manner of OUR stable democracy?)

*** I saw Armored Vehicles in Constant Patrol --

(Is this the manner of OUR stable democracy?)

*** I saw - in this tiny area - FORTS // ARMY BARRACKS //

STOCKADES // BARBED WIRE (Like the Waves of the OCEAN)

Where we'd have Ball-Fields & Childrens Playgrounds ---

(In other words, it's a prison camp)

*** I saw Television Cameras --- mounted on High Observation Towers --
scrutinising even those who visit the graves in the cemetery!

(Is this the manner of OUR stable Democracy?)

*** When British Helicopters -- descend and hover ---

to drown out the prayers or eulogy at a Graveside ---

(Is this the manner ----?)

When Judge Sofaer explains that TRIAL BY JURY

has been replaced --by NON-JURY Courts --

because (Here are his words) --

"The Extraordinary Situation that Britain has
faced in Northern Ireland."

(P A C E D ? Britain created that extraordinary situation!!)

(Is THIS the manner?)

*** Finally, when Britain is forced to maintain --

(in that little Afghanistan)

a force of 30,000 under such arms as Cannon - Mortars -

Army Rocket-launchers & Navy Landing-Craft --- even --

Computerized Profiles of Thousands of Men/Women/
CHILDREN

who might be Unsympathetic to this Miserable existence ---

(Is this the manner of our stable democracy?)

Mr. Chairman and Committee, with such a "stable democracy" as the
basis for the Administration's case, I urge that this committee
representing OUR - AMERICAN - Way of life - NOT pass along --
to the august body -- of the United States Senate ---- this
Frivolous - Opportunistic - Outrageous request. Thank You.

PREPARED STATEMENT OF WILLIAM M. HANNAY, ESQ.

Mr. Chairman and Members of the Committee, I am appearing before you today to testify in support of the Supplementary Extradition Treaty between the United States and the United Kingdom which was signed on June 25, 1985.

I am a member of the law firm of Schiff Hardin & Waite and an Adjunct Professor at Chicago-Kent College of Law in Chicago. I have been an Assistant District Attorney for the County of New York and have studied and written about the subject of international terrorism for more than a dozen years. More specifically, I have studied and written about the "political offense" exception in international extradition proceedings and testified in connection with efforts to recodify U.S. extradition procedures during the 97th Congress. My most recent law review article on the subject of the political offense exception was published earlier this year in the Denver Journal of International Law and Policy, a copy of which is attached to this statement as an appendix.

My testimony today has two purposes: First, to identify the central reason why the Senate should swiftly give its consent to ratification of the Supplementary Treaty and, second, to explain why the principal arguments of the Treaty's opponents lack merit. For purposes of my testimony,

I assume that the Committee is familiar with the background and definitions associated with the political offense exception and will therefore proceed directly to the critical issues in the current debate over Article I of the Treaty.

There is one overpowering reason for ratifying this treaty: To do otherwise would undercut the essential element of all democracies and republics, i.e., the resolution of political disputes through the political process. A vote against this treaty is a vote against democracy and in favor of lawless, self-centered violence. The issue is a simple one. If you vote against this treaty, you are saying that, as a matter of our national policy, it is perfectly all right for someone to pick up a gun and kill any policeman or soldier that he sees just because the legislature is not moving as quickly as he likes in the direction that he likes. This should not, must not, be the policy of a democracy, and certainly not the policy of the United States.

Let us go to the heart of the present debate over this treaty. Should there be a blanket rule that excludes murder from the political offense exception in democratic countries? My answer is resoundingly yes. The Supplementary Treaty should be ratified exactly as it is written. The language of the Supplementary Treaty should not be revised or amended to weaken its strong stand against politically-

motivated violence. No waffling phrase like "except in extraordinary circumstances" should be considered. There are simply no "extraordinary circumstances" that would justify the politically-disaffected in taking up arms against our democratic government, and the same is true of the United Kingdom.

Before going any further, let me identify what I see as the "givens" in this debate. In the comments of various opponents of the treaty, I find no objection to that portion of the treaty which excludes from the political offense definition the offenses set forth in the Hague and Montreal Conventions on aircraft highjacking, the New York Convention (IPP), and the Hostage Convention. Nor does there appear to be objection to excluding from the political offense definition "pure" terrorist violence involving random attacks on civilians such as the bombing at Harrod's. Nor do the opponents of the treaty object to excluding war crimes or other breaches of the Geneva Conventions of 1949 from the political offense definition. I applaud the opponents of the treaty for recognizing the appropriateness of these limits on political violence. If the Supplementary Treaty were limited to these indisputable forms of "terrorism," I doubt that we would be conducting this hearing today. But the fact is that the treaty says more than that. And it should.

The Supplementary Treaty says that murder and other forms of violence to persons fall outside the political offense definition. As between two democratic countries, such a restriction on the type of conduct that may be justified as "political" is entirely appropriate and in accordance with international precedent. Let me cite two such precedents.

In the 1977 Council of Europe's Convention on the Suppression of Terrorism, Article 1 flatly states that, *inter alia*, "an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb, if this use endangers persons" shall not be regarded as a political offense. Article 2 states that "a Contracting State may decide not to regard as a political offense . . . a serious offense involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person."

A second precedent comes from France in ruling on the request for the extradition of Tomas Linaza-Echevarria, the *Chambre d'Accusation* of the French Court of Appeals upheld the extradition of a reputed Basque terrorist for the murders of an alderman and six members of the Civil Guard in Spain. The fugitive claimed that the acts with which he was charged "were perpetrated as part of the struggle for political autonomy waged by a segment of the population in the Basque provinces of Spain." The court rejected the argument that the fugitive's conduct was covered by the political offense exception. The

court stated that: "Irrespective of the object sought or possible context, [murders] are too serious to be regarded as having a political character or as being related to a political offense." These authorities are solid precedent for Article I of the Supplementary Treaty.

Let us turn to the principal argument of those who oppose the treaty. Opponents of the treaty seek to draw a distinction between a "terrorist" and a genuine "rebel." According to these critics, while a few Provos or IRA members may have engaged in terrorist acts (and therefore be extraditable for such acts under one of the conventions or theories described above), the bulk of the IRA members -- such as Mackin, Quinn and the others who fled to the United States and whose extraditions were unsuccessfully sought -- are merely "rebels," performing warlike acts in the course of a rebellion or uprising. Citing the American Revolution, these critics argue for the existence of a "right to rebel" which must be respected or, alternately, urge a policy of refraining from taking sides in domestic civil wars. According to these critics, "rebels" should never be extradited.

If the opponents of the treaty have proved the existence of a "right to rebel," they have proved too much. They have proved the existence of a right without limit that destroys the very nature of organized society. The opponents

of the treaty dignify the lawless violence of the IRA and the Provos as "non-international armed conflict" and would force this country to continue granting them sanctuary. Such an approach is unacceptable to those who believe, as do I, that the only valid way to resolve the problems in Northern Ireland is through the political process.

A recent editorial in the Chicago Tribune makes this same point in endorsing the Supplementary Treaty. The Chicago Tribune recommends looking to the example of Ireland itself with respect to whether the activities of IRA gunmen are "political." The Tribune points out that the IRA is outlawed in the Irish Republic and that recently an IRA man wanted in Northern Ireland for the murder of a postal official was extradited to British authorities by the Irish courts just last year. The Tribune editorial adds:

American civil libertarians and some judges have strained to draw a fine line between IRA murders of women and children and those of British soldiers or Ulster policemen, claiming the latter were politically motivated. In Ireland, as in Ulster and Great Britain, no such distinction is made or tolerated. The Irish are tired of having their own policemen killed or wounded by IRA street criminals.

Negotiations have been underway for more than a year between the British and Irish governments to try to find a political solution to the problems of Northern Ireland, and those negotiations have reached a critical stage. See New York Times, October 6, 1985, Section 1 at 8, Col. 1.

These talks are as unpopular among Protestant extremists who want Northern Ireland to remain British as with the Sinn Fein, the political arm of the IRA, which argues that the talks serve only to neutralize nationalist aspirations. Id. Yet they are the only hope for a just resolution of the political conflict there.

The Northern Ireland issue generates substantial emotion. That emotion can be felt in the pressure brought to bear on U.S. Senators by Irish-American groups that oppose the treaty. But emotion is no substitute for reason. Because the question of whether Ireland and Northern Ireland should be one country (or whether Great Britain and Northern Ireland should continue to be one country) may be a complicated question, it does not stand to reason that the Supplementary Treaty presents a complicated question.

The issue before you is as simple as I stated it at the beginning of my statement. The United States does not serve the interests of citizens of Northern Ireland, be they Catholic or Protestant, by contributing to the destabilization of the political process in that country. Nor does the United States serve its own interests in protecting American citizens around the globe by refusing to take a strong stand against political violence. What is necessary is for the United States to stand together with the United Kingdom and every other nation whose institutions of democratic governance

are in place and to reject political violence as a means of political change within their borders. All democratic nations must stand united on this fundamental principle. Ratification of the Supplementary Treaty would put this principle into effect and would, in the words of the New York Times, seal off "a terrorist foxhole."

I appreciate the opportunity to testify before the Committee and would be pleased to answer any questions that you may have.

W.M.H.

Prepared Statement of Prof. Christopher H. Pyle

The last time we met I sought to make two main points. First, that there are better ways to facilitate the extradition of terrorists than the approach taken by this administration. Second, the best way to proceed is to quietly shelve this treaty and go back to writing legislation.

The last time we met I gave you a chart that set forth seven different ways to deal with the problem of exempting terrorists from the political crimes defense. Of those seven ways, I suggested, the categorical exemption of all crimes of violence proposed in this treaty is the worst. It is the worst for seven reasons.

First, the treaty is not neutral towards the merits of a foreign struggle for power, but puts our courts squarely on the side of helping a foreign regime suppress rebels against its authority. It pledges that assistance not only now, but forever, anywhere in the world that there is a rebellion against British rule, from the Orkneys to the Falkands, from Gibraltar to Pitcairn Island. The treaty would create an irrebuttable presumption that the British will always be fair. As admirable as the British may be, this is not a presumption we should apply to any country, not even our own.

Second, the treaty makes no distinction between legitimate rebels and illegitimate terrorists. Under this kind of treaty, George Washington, Simon Bolivar, Robert E. Lee, and Golda Meir would all be extraditable as "terrorists."

Third, the treaty ignores the fact that real terrorists are already extraditable under the wanton crimes exception to the political crimes defense. By "real terrorists," I mean the sort of people who killed Lord Mountbatten, bombed the Queen's Horse Guards, and murdered Leon Klinghoffer on board the Achille Lauro. These people deserve to be extradited because, in Congressman Hughes's words, they committed "wanton and indiscriminate acts of violence with extreme indifference to to the lives or safety of persons not taking part in armed hostilities."

Fourth, the treaty is essentially a court-stripping measure that attacks the capacity of our courts to avoid serving as the long arm of foreign injustice. The power to decide which rebels should be shielded from surrender would be transferred to the executive, which would then pick-and-choose the way the Italians and Yugoslavs did (or at least seemed to do) recently.

Fifth, the treaty would reject a system of international law adhered to by virtually all western nations for over a century. It would set up a system of extradition based on ideological and military alliances, like that adopted by Austria, Prussia, and Russia during the nineteenth century, and like that now employed by the Soviet Union and its satellites.

Sixth, the treaty is so poorly drafted that it violates other established principles of extradition law, including the serious crimes rule, the rule of double criminality, and the practice of not extraditing for conspiracies.

Finally, the treaty would set up a two-track system of extradition treaties. This system would be disastrous to administer and would, over time, would force removal of the political crimes defense from most of our extradition treaties. As Senator Dodd pointed out last time, if the Senate accepts the idea that we should have one system of treaties for supposedly democratic and fair nations and another for non-democratic, unfair nations, then this Committee is going to have to hold hearings into the politics and justice of a foreign nation each time one of these treaties is proposed. Worse, the administration is going to have to tell many nations that they cannot have "favored nation status" under our extradition treaties, and suffer reprisals for saying so. In time, our political, military, and diplomatic needs will force extension of this favored nation status to many authoritarian countries, just as our favored-nation trade rules now favor some of the worst nations on earth.

For these reasons and more, I believe this treaty should be shelved. Then Congress should go back to the hard task of legislating an exception for terrorists that can be applied equally and in a principled and neutral manner to extradition requests from all nations.

The political crimes defense must be uniform, principled, and neutral because extradition is a matter of law, not politics. It must focus on what the accused is alleged to have done, not what his organization is said to have done, because ours is a system of individual justice. It must not put the liberty of alleged rebels and their American supporters, or former officials of deposed regimes, in the hands of executive officials, because the habeas corpus and due process guarantees of our Constitution forbid the surrender of either citizens or aliens to foreign regimes for reasons of state.

PREPARED STATEMENT OF STEVEN LUBET

I appreciate the opportunity to testify before this committee today. I am a professor of law at Northwestern University, and the author of three articles on international extradition; I have attached my curriculum vitae hereto for your convenience. I would like to stress that I testify here today as a lawyer and writer on the legal aspects of extradition, and not as a political theorist. Accordingly, I will confine my remarks to the legal aspects of certain features of the proposed supplementary extradition treaty between the United States and the United Kingdom. Specifically, I will discuss: (1) the proposed definitional change in the political offense exception, (2) the advisability of taking a treaty-by-treaty approach to this issue, (3) the retrospective application of the treaty amendments, and (4) the statute of limitations provision of the proposed amendment.

Definition of Political Offense

The supplementary extradition treaty redefines the political offense exception as it would apply between the United States and the United Kingdom by excluding certain specified offenses from its ambit. Although the specific list of exclusions has generated substantial controversy (a fact of which I surely need not remind this committee), the need for some reform in this area is undeniable.

Neither the United States Code nor current American extradition treaties provide a textual definition for the political offense exception. Facing this legislative void the courts have fashioned a series of tests over the years that have one thing in common: they are all based on the 19th Century British case In re Castioni. As I have written elsewhere, the Castioni, or "incidence," test does not provide a workable framework, as it is both under-inclusive and over-inclusive. The test is under-inclusive in that it fails to extend its protection to political dissidents who were not involved in the required uprising or disturbance. This flaw may be more theoretical than substantial, since it remains within the purview of the Executive Branch to deny extradition in such cases. The over-inclusiveness of the test, however, is more troublesome. This is so because judicial action denying extradition is not reviewable under current American law. Thus, in those cases where a court extends political sanctuary on the basis of contemporaneity with a disturbance or uprising, the government is powerless to take further action. It is ironic indeed that the United States should adhere to the incidence test long after it has been abandoned even by the British who originated it. The amended extradition treaty with the United Kingdom seeks to remedy the problem of over-inclusion by removing certain crimes from the coverage of the political offense exception. Thus, the scheduled offenses would always be subject to extradition, even where committed in the course of a political disturbance or uprising. In other words, contemporaneity could never be the basis of a political defense.

Some of the exclusions are unarguable. These include aircraft hijacking, aircraft sabotage, crimes committed against internationally protected persons and diplomats, as well as the taking of hostages. All of these offenses are recognized as international crimes under various multilateral conventions. Indeed, these exclusions essentially track the European Convention for the Suppression of Terrorism. It could not be argued seriously that any civilized nation should offer asylum to aircraft hijackers and the like, no matter what their motivation or the context of the crime. If anything, this list of crimes is too short. The list could well be extended to include war crimes and, as the recent events in Port Said demonstrate, piracy.

This brings us to the remaining, controversial exclusions. The treaty removes from political offense consideration an extended list of violent crimes including murder, manslaughter, and crimes involving bodily harm, firearms, explosives, and damage to property where the risk to human life is inherent. These exclusions, if enacted, would very nearly abolish the concept of "relative" political offenses as between the United States and the United Kingdom. Thus, common crimes would be treated exclusively as common crimes, and could not be transformed into political offenses by virtue of their relationship to a political act. It should be noted that the pure political offenses -- treason and espionage -- will not be affected by this change. Moreover, the relative political offense doctrine will retain its vitality with regard to non-violent crimes such as property damage and trespass. Finally, although the treaty also de-politicalizes attempts to commit the

scheduled crimes, it does not appear to apply to conspiracy except in the case of the setting of explosives.

In another context, I have written that such an exclusion of all violent crimes from the political offense exception would sweep too broadly. That opinion, however, was directed at the possibility of the enactment of general legislation that would apply across the board to every extradition treaty. Such a widely applicable retrenchment would be far too restrictive, given the nature of the many governments with which the United States maintains extradition treaties. At the time that I first articulated this position, Lech Walesa was still in prison in Poland. I therefore put forth the example of the leader of the Solidarity Union escaping from a Polish prison while using a firearm. Since the United States maintains an extradition treaty with Poland, we surely did not want to enact legislation that might require us to return someone like Mr. Walesa to the Jaruzelski government. I continue to believe that the complete removal of violent crimes from the political offense exception as regards every nation in the world would be an unwise exercise of legislative power; it does not follow, however, that this would be an inappropriate revision to make on a treaty-by-treaty basis. I shall discuss this issue in more detail shortly.

First, I would like to respond to the argument that the so-called "heinous crimes" doctrine makes definitional restriction unnecessary. It has been suggested to this committee that the heinous or wanton crimes doctrine, as most clearly articulated in the case Abu Eain v. Wilkes, already excludes from the political

offense exemption crimes of violence committed against civilians. This, it is argued, is protection enough against the possibility of granting haven to terrorists. I am certainly pleased that the heinous or wanton crimes doctrine has gained such wide acceptance; I take some pride in the fact that the Seventh Circuit cited my own work in arriving at its conclusion in the Abu Eain case. The problem, however, is that the wanton crimes doctrine has not been accepted as universally as some would have you believe. One court in the last few years has specifically rejected it, stating that "no matter how heinous" the crime it is free from extradition if it is committed under political circumstances. Another court flatly refused to follow the Seventh Circuit lead, virtually referring to the doctrine as unacceptable emotionalism. The wanton crimes exception, while clearly the better view of the law, is not so firmly established as to be a reliable substitute for legislation or treaty reform.

An additional problem with this approach is that it appears to declare "open season" on those who wear uniforms. Since the wanton crimes exclusion applies only to civilians, it would have no effect in cases such as the murder of Robert Stepham in Beirut, the kidnapping of General Dozier in Rome, or the murder of Aldo Moro by the Italian Red Brigades. In other words, the wanton crimes/innocent bystander approach represents only the minimal position that a civilized nation can take. It does not dictate that allies, in their by-lateral relations, cannot go further.

Treaty-by-Treaty Revision

The proposed treaty now before this committee represents the first attempt at specific revisions of the political offense exception on a treaty-by-treaty basis. It has already been argued to this committee that such revisions, although clearly called for, would be more appropriately effected through general legislation. There is, of course, no doubt that the legislative approach would have the advantage of uniformity. I do not believe, however, that uniformity is a necessity when dealing with the substantive aspects of the political offense exception.

In discussing this issue, it is first necessary to separate the procedural aspects of extradition from the substantive law. With regard to procedure, uniformity is clearly a must. There is no reason for courts to be required to apply different rules to different defendants and different countries on such matters as admissibility of evidence, quantum of proof, and burden of persuasion. On the other hand, there is no reason not to differentiate on a country-by-country basis as regards those crimes that may be considered political. A simple survey of the nations with which the United States maintains extradition treaties is sufficient to prove this point. We currently have treaties in effect with somewhere approaching one hundred different countries. There is no unifying feature among these nations; they include western democracies, authoritarian dictatorships, communist regimes, and even the apartheid state of South Africa. This, of course, is appropriate, since we want to be able to obtain extradition of fugitives from as many locations in the world as

possible. It does not follow at all, then, that each of these treaties should or must be identical. Considering the nature of the particular regime and its relationship to the United States, we might well want to negotiate either a broad or a restrictive extradition treaty as circumstances warrant. For example, our relationship with Canada no doubt calls for the maximum level of cooperation, while we would obviously not choose to be as forthcoming with Poland, Albania, or South Africa. If we were required to treat every nation in the same manner that we regard our closest allies and neighbors, we would no doubt have to curtail drastically our number of treaty partners, thereby defeating the goal of maximum extraditability.

Moreover, we already take a treaty-by-treaty approach to a number of aspects of international extradition. The most obvious, and the most substantive, example of this is the listing of extraditable offenses. Some treaties are extremely broad in this regard, allowing extradition for any offense, no matter how denominated, that is criminal in both jurisdictions. Others provide extradition only for certain scheduled crimes. Thus, under currently existing treaties, extradition concerning certain offenses may be available to some countries but not to others. Nonetheless, there is no movement, nor would it be desirable, to enact general legislation that would list definitively the offenses for which the United States will grant extradition. Other areas that vary from treaty to treaty include lapse of time provisions, extraditability of citizens, and plural jeopardy.

Undertaking treaty-by-treaty revisions with a select group of countries is not inconsistent with enacting legislation that will apply in the absence of treaty terms to the contrary. This brings us back to the point that I made earlier about the so-called wanton crimes exception. As a matter of general legislation, such a provision is an absolute necessity and should pertain to every extradition treaty. That is, we should make the legislative determination that we will not, under any circumstances, shield those who slaughter civilians, no matter what country is seeking their rendition. If we are not willing to return fugitives under these circumstances, then we simply should not have an extradition treaty with the country in question. Once we move beyond that point, however, country-by-country differentiation is appropriate so as to allow us to distinguish between repressive regimes and functioning democracies.

The decision to reform the political offense exception through bilateral negotiations with a select group of countries does not inevitably require that the United Kingdom be included on the list. Many witnesses have testified to this committee that the regime in Northern Ireland is not typical of British law and fails to meet the test of fairness and democracy. I must reemphasize that I speak to you today as a legal analyst and not as a political theorist. Like everyone else, of course, I do have opinions on political matters. Concerning the British occupation of Northern Ireland, it is my political opinion that the partition should be brought to an end and that the six counties should be reunited with the Republic of Ireland. This does not, however, lead me to the

legal conclusion that we should avoid revision of the political offense exception in our extradition treaty with the United Kingdom.

The principal argument raised against the treaty revision has been the reputed unfairness of the so called Diplock courts in which security offenders are brought to trial in Northern Ireland. Under any method of analysis, it must be concluded that the Diplock court system, while far from optimal, comports with the basic requirements of fairness and due process. The trials are public, the defendants are given notice of the charges, they have the right to counsel, the right to confrontation, and the privilege against self-incrimination. This committee has already been advised that over 50% of those cases that have actually proceeded to trial in the Diplock courts have resulted in the acquittal of the defendant. This statistic compares well with our own judicial system. Moreover, there also exists the right to appeal from a conviction in a Diplock court, and we have every reason to believe that verdicts of guilty are given strict judicial scrutiny. Within the last few weeks an appeals court in Belfast voided the murder conviction of Dominick McGlinchey on the basis of insufficient evidence. This reversal is particularly noteworthy, given that McGlinchey has been described as the most wanted terrorist in all of Ireland, North and South, and has been implicated in over thirty killings and two hundred terrorist attacks. If the British judicial system can act fairly in a case such as this, it is hard to find the basis for an argument that due process is not available. The only remaining argument against the Diplock courts is that they

do not afford the right to a jury trial. While trial by jury is an essential feature of our judicial system, we have never required it of our extradition partners. We maintain treaties with numerous countries that do not have a jury system including France and Israel.

Let me hasten to add that there is definite and definable unfairness in the legal regime that governs Northern Ireland. The widespread use of administrative detention, not to mention the relaxed approach to search and seizure, is without question antipathetic to our judicial principles. These systemic failures, however, cannot impact upon extradition cases because they cannot apply to fugitives who are apprehended in the United States. Let us take administrative detention as the paradigm. Under the terms of the United States-United Kingdom extradition treaty we can never be requested to surrender a fugitive who will subsequently be placed under administrative detention. This is the case because both the treaty and American statutory law require that a specific charge must be lodged in order for extradition to be allowed. Consequently, extradition can never take place in the absence of a precise charge and administrative detention can never be a possibility. Moreover, the well-recognized Rule of Specialty provides that a defendant may not be tried for any offense other than those for which he or she has been extradited.

Questions have also been raised regarding the conditions of confinement for security prisoners in Northern Ireland. These issues, however, have never been open for consideration by the American courts under the Rule of Non-Inquiry, and the amended

extradition treaty does not remove from the executive the power to deny extradition in cases where the expected treatment of the prisoner so requires.

A final commentary on the fairness of the Diplock courts is that both the United States and the Republic of Ireland currently allow extradition for defendants who will be tried therein. With regard to the United States, non-political security offenses (e.g. wanton crimes) are now and always have been extraditable to the Diplock courts. Indeed, Dominick McGlinchey, whom we discussed earlier, was extradited from the Republic of Ireland to face trial for a security offense. As I understand it, no responsible opponent of this treaty has argued that heinous or wanton crimes against civilians should ever be immune from extradition. Since these crimes would necessarily be tried in the Diplock courts, it follows that those courts must be capable of administering fair trials. Stated otherwise, it cannot be argued that the Diplock courts are fair to some security offenders and not to others.

Retrospective Treaty Application

An additional provision of the proposed treaty amendment that has caused some concern is its application to offenses committed before the supplementary treaty enters into force. Some have suggested that this amounts to an ex post facto law. This is not the case.

An ex post facto law is one that imposes punishment for an act that was not criminal at the time of its commission. Article Four of the supplementary treaty, however, provides specifically that extradition cannot be allowed for an offense that was not criminal

under the laws of both the United States and the United Kingdom at the time of its commission. Thus, no person can be subjected to punishment under this treaty other than for an act that was criminal when it occurred.

It is well settled law that extradition treaties are applicable to acts that occurred prior to ratification, so long as the treaty itself does not provide to the contrary. This is and has been the state of the law in the United States; in my opinion, this treaty would therefore have retrospective application even in the absence of a specific term. This is appropriate because extradition itself is not punishment, but rather a vehicle for the provision of a trial.

It may be helpful in this regard to analogize the law of extradition to the law of arrest. In both cases, individuals are seized and held for trial, and in both cases, changes in the technical law may be applicable to crimes committed prior to the change. For example, when a legislature enacts stop and frisk or no-knock legislation, these devices may be used to gather evidence or detain suspects for the prosecution of crimes that preceded their enactment. So too it is with extradition; the ratification of a treaty provides only a device for bringing in accused to trial and therefore need not precede the commission of the crime.

The necessity of such a rule is made clear by recent events in the Republic of Ireland. There, a judge ruled in the last few weeks that the extradition treaty between the United States and Ireland was invalid because it had not properly been ratified by the Irish parliament, or Dail. Consequently, the judge ruled that James

Gilliland, who is wanted in the United States for financial crimes, could not be extradited. This ruling would appear also to apply to one Joseph Maloney, who is wanted in the United States for the murder of his wife. One can say with relative confidence that any technical defect in the ratification of the extradition treaty between the United States and Ireland will eventually be remedied. Nonetheless, in the absence of a rule allowing retrospective treaty application, any subsequent rectification would not apply to Gilliland and Maloney. Consequently, these men would never be required to face trial in the United States, notwithstanding the clear illegality of the alleged offenses at the time of commission. Thus, it can be seen that the rule of retrospective application is one of logic and justice, and is not motivated by political animus.

Statute of Limitations

The remaining noteworthy provision of the proposed treaty amendment is the change that it makes concerning the statute of limitations. Under the current United States-United Kingdom treaty, extradition will not be allowed where prosecution is barred by the statute of limitations of either the requesting or the requested country. The new treaty will change this by looking only to the statute of limitations of the requesting country. This makes great sense.

A statute of limitations or lapse of time provision is neither an element of natural justice nor a requirement of due process, rather it has always been held to be an act of legislative grace. There can be little reason for the legislature of one country to be empowered to extend its grace to fugitives wanted in another. We

refrain from imposing our rules of evidence or other legislatively created procedures in cases of extradition, and I can see no reason to insist on imposing our own statute of limitations.

Indeed, many of our current extradition treaties look to the statute of limitations of the requesting country, and this appears to have engendered neither controversy nor unfairness. The committee may recall that in 1983 the Senate ratified a new extradition treaty between the United States and Italy that contained precisely such a provision. It remains to be seen whether the four murderers of Leon Klinghoffer will be extradited from Italy to the United States, but we should be pleased that the lapse of time provision governing rendition will be our own.

Finally, allow me to say a word about the very compelling scenario set out in the statement of Professor Charles Rice. Professor Rice points out that the United Kingdom has essentially no statute of limitations for crimes of of armed violence. Thus, he argues that several septugenarian veterans of the Irish risings against the British earlier in this century could be subject to extradition should the treaty amendment be ratified. Professor Rice is certainly correct when he states that the extradition of such aged former rebels would shock the conscience and should never occur. What Professor Rice overlooks is the fact that in all likelihood these men are also extraditable under current American law as it governs the current extradition treaty with Great Britain.

This is the case for two reasons. First, the United States recognizes no statute of limitations for the crime of murder and to

the extent that these men are wanted for murder there is now no lapse of time provision standing as a bar. Second, it must always be remembered that the federal statute of limitations is tolled with regard to fugitives. Thus, assuming that the men known to Professor Rice fled Ireland within five years of the offenses for which they are theoretically sought, the tolling provision would apply right up to the present time and they would therefore be extraditable even under the United States statute of limitations.

Conclusion

Thank you again for the opportunity to present my views. In summation, allow me to say that I see no legal reason for this committee to vote to deny ratification. There may be political reasons to oppose the treaty, in the sense of opposing the administration of the British regime in Northern Ireland. In that regard, of course, academics must always defer to the judgment of this body. I feel constrained, however, to point out that to defeat this treaty on that ground would not result in taking a stance of neutrality as some have argued. Rather, the result clearly would be to adopt a position not only critical of, but in clear opposition to the United Kingdom. That decision, of course, is yours.

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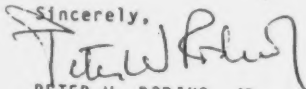
The Honorable Richard G. Lugar
Chairman
Committee on Foreign Relations
U. S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for inviting me to express my views on the Supplementary Extradition Treaty between the United States and the United Kingdom currently under consideration by the Senate Foreign Relations Committee.

Unfortunately, other commitments prevented me from appearing before your Committee at its September 18 hearing on the proposed Treaty. I have, however, prepared the attached statement of my views and request that they be inserted in the printed record of that hearing.

Sincerely,


PETER W. RODINO, JR.
Chairman

PWR:mf

Enclosure

STATEMENT OF PETER W. RODINO, JR.
CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY
ON THE
SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE
UNITED STATES AND THE UNITED KINGDOM
BEFORE THE
SENATE FOREIGN RELATIONS COMMITTEE

MR. CHAIRMAN, I AM PLEASED TO PRESENT MY VIEWS ON THE PROPOSED SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM.

AT THE OUTSET, LET ME ASSURE YOU THAT I SHARE THE ADMINISTRATION'S BELIEF THAT STRONG MEASURES MUST BE TAKEN TO COMBAT THE RISE IN TERRORISM. AN IMPORTANT DUTY OF ANY NATION IS TO PROTECT ITS CITIZENS FROM BODILY HARM. EVERY AMERICAN, ESPECIALLY THOSE OF US IN GOVERNMENT, FEEL GREAT OUTRAGE AND A SENSE OF HELPLESSNESS WHEN VIOLENT ACTS, LIKE THE RECENT HIJACKING OF THE TWA JET LINER, ARE PERPETRATED AGAINST INNOCENT INDIVIDUALS. WE WILL NEVER BE ABLE TO ELIMINATE SUCH HEINOUS CRIMES AGAINST MANKIND UNLESS TERRORISTS REALIZE THAT THEIR ACTS OF VIOLENCE AGAINST INNOCENT VICTIMS WILL NOT GO UNPUNISHED.

HAVING SAID THAT, HOWEVER, I WANT TO RAISE SEVERAL CONCERNS ABOUT THE PROPOSED TREATY NOW UNDER CONSIDERATION BY THIS COMMITTEE. ALTHOUGH SUPPORTERS OF THE TREATY MAINTAIN THAT ITS PRIMARY GOAL IS TO COMBAT INTERNATIONAL TERRORISM, IT, IN FACT, GOES MUCH FURTHER. AS CURRENTLY DRAFTED, THE TREATY WOULD EFFECTIVELY ELIMINATE THE "POLITICAL OFFENSE EXCEPTION", WHICH HAS BEEN A PART OF AMERICAN EXTRADITION PRACTICE AND

CASE LAW FOR OVER 100 YEARS. UNDER THIS EXCEPTION, AN INDIVIDUAL WHOSE EXTRADITION IS REQUESTED BY A FOREIGN STATE IS ABLE TO CLAIM IN COURT THAT THE ACT HE COMMITTED WAS POLITICALLY MOTIVATED AND SHOULD NOT BE CONSIDERED AN EXTRADITABLE CRIME. IF THE COURT FINDS HIS CLAIM TO BE VALID, HE IS NOT EXTRADITED.

OUR NATION CAME INTO EXISTENCE THROUGH REVOLUTION AGAINST A POLITICAL SYSTEM DETERMINED BY OUR FOUNDING FATHERS AND MOTHERS TO BE UNJUST. TRADITIONALLY, WE HAVE BEEN VIEWED AS SYMPATHETIC TOWARD OPPRESSED PEOPLES AROUND THE WORLD AND AS A HAVEN FOR POLITICAL REFUGEES. THUS, THE POLITICAL OFFENSE EXCEPTION HAS SERVED US WELL AND SHOULD NOT BE CHANGED WITHOUT CAREFUL CONSIDERATION BY BOTH BODIES OF CONGRESS.

CONTRARY TO THIS STANDARD, HOWEVER, THE SUPPLEMENTARY TREATY -- DRAFTED BY THE EXECUTIVE BRANCH AND SUBJECT TO RATIFICATION BY THE SENATE ALONE -- MAKES A MAJOR CHANGE IN THE POLITICAL OFFENSE EXCEPTION BY EXEMPTING A DETAILED LAUNDRY LIST OF ACTIONS FROM THAT EXCEPTION. ALTHOUGH THE PURPORTED AIM OF THE TREATY IS TO ADDRESS THE PROBLEMS ASSOCIATED WITH INTERNATIONAL TERRORIST ACTIVITY, THE EXCLUSIONS FROM THE POLITICAL OFFENSE EXCEPTION GO FAR BEYOND THOSE DEEDS NORMALLY CONSIDERED TO BE THE WORK OF TERRORISTS -- THE HIJACKING OF AIRPLANES AND THE TAKING OF HOSTAGES, FOR EXAMPLE -- TO INCLUDE ORDINARY ACTS OF VIOLENCE, DESTRUCTION OF PROPERTY, AND POSSESSION OF FIREARMS. IN ESSENCE, THEN, RATIFICATION OF

THE TREATY WOULD PREVENT THE COURTS FROM CONSIDERING ANY ACT OF VIOLENCE TO BE A POLITICAL OFFENSE EVEN IF THERE WERE MITIGATING CIRCUMSTANCES. THUS, THE DECISION ABOUT WHETHER TO EXTRADITE AN INDIVIDUAL WOULD BE REMOVED FROM THE COURTS AND WOULD BE ENTIRELY WITHIN THE DISCRETION OF THE EXECUTIVE BRANCH. THE DANGER WITH THIS ARRANGEMENT IS THAT DETERMINATIONS REGARDING EXTRADITION COULD BE UNDULY INFLUENCED BY INTERNATIONAL POLITICAL CONSIDERATIONS.

THIS DRASTIC CHANGE IN THE POLITICAL OFFENSE EXCEPTION WOULD APPLY ONLY TO THE UNITED KINGDOM -- "A STABLE DEMOCRACY" WITH A JUDICIAL SYSTEM THAT "PROVIDES FAIR TREATMENT," AS THE TREATY'S PROPONENTS ARE QUICK TO POINT OUT. I WILL NOT DISPUTE THAT CLAIM TODAY. YOU HAVE ALREADY HEARD TESTIMONY BY INDIVIDUALS MORE KNOWLEDGEABLE THAN I THAT THE SYSTEM OF JUSTICE IN NORTHERN IRELAND DOES NOT AFFORD THE MEMBERS OF THE PROVISIONAL IRISH REPUBLICAN ARMY THE PROTECTIONS THAT OUGHT TO BE GUARANTEED BY A "FAIR" JUDICIAL SYSTEM. THE HEATED DEBATE SURROUNDING THIS ISSUE MERELY EMPHASIZES ONE OF THE DIFFICULTIES THAT WILL OCCUR IF CHANGES IN OUR EXTRADITION LAW ARE MADE ON A TREATY-BY-TREATY BASIS. DO WE REALLY WANT TO BE FORCED INTO JUDGING THE POLITICAL AND LEGAL SYSTEMS OF OUR FRIENDS AND ALLIES?

I STRONGLY BELIEVE THAT CHANGES IN OUR EXTRADITION POLICY SHOULD NOT BE MADE ON A PIECEMEAL BASIS WITH INDIVIDUAL

COUNTRIES. TRADITIONALLY, ALL NATIONS WITH WHICH WE HAVE HAD EXTRADITION TREATIES HAVE BEEN SUBJECT TO THE SAME POLICY. UNDER THAT POLICY, WE HAVE BEEN ABLE TO REMAIN NEUTRAL AND HAVE NOT BEEN FORCED INTO TAKING SIDES ON INTERNAL POLITICAL DISPUTES. RATIFICATION OF THE PROPOSED TREATY WITH THE UNITED KINGDOM COULD VERY WELL LEAD TO REQUESTS FROM OTHER COUNTRIES TO REWRITE THEIR EXTRADITION TREATIES, PUTTING US IN THE DIFFICULT POSITION OF DETERMINING WHICH OF OUR FRIENDS AND ALLIES HAVE DEMOCRATIC GOVERNMENTS AND JUST LEGAL SYSTEMS.

MOREOVER, POLITICAL SITUATIONS CAN CHANGE QUICKLY; FRIENDS AND ALLIES HAVE BECOME FOES ALMOST OVERNIGHT, AND EACH NEW ADMINISTRATION IN OUR COUNTRY BRINGS WITH IT ITS OWN DEFINITION OF "FRIEND" AND "ALLY". FINALLY, WE MUST GUARD AGAINST THE POSSIBILITY OF OUR EXTRADITION POLICIES BEING USED AS A "BARGAINING CHIP" IN INTERNATIONAL NEGOTIATIONS ON A VARIETY OF ISSUES. THE POLITICAL OFFENSE EXCEPTION, SO LONG A PART OF OF EXTRADITION PRACTICE, MUST CONTINUE TO BE BASED ON FUNDAMENTAL LEGAL DOCTRINE AND NOT ON THE PREVAILING POLITICAL WINDS IN THE INTERNATIONAL COMMUNITY.

HAVING RAISED THESE OBJECTIONS ABOUT THE PROPOSED TREATY, I DO NOT WANT TO LEAVE YOU WITH THE IMPRESSION THAT NO CHANGES ARE NEEDED IN OUR EXTRADITION LAW. I AGREE THAT THE POLITICAL OFFENSE EXCEPTION AS WELL AS OTHER PARTS OF THAT LAW NEED MODERNIZATION. HOWEVER, IN OUR HASTE TO ENSURE PUNISHMENT OF

TERRORISTS WHO COMMIT WANTON ACTS OF VIOLENCE WITHOUT REGARD FOR INNOCENT LIFE, WE MUST TAKE CARE NOT TO ELIMINATE THE PROTECTIONS CURRENTLY AFFORDED BY THE POLITICAL OFFENSE EXCEPTION TO INDIVIDUALS WHO HAVE JUSTIFIABLY REVOLTED AGAINST AN UNFAIR POLITICAL SYSTEM. THE ONLY WAY TO ENSURE BOTH RESULTS IS THROUGH THE CAREFUL DEBATE OF THE LEGISLATIVE PROCESS.

CONGRESS BEGAN THIS PROCESS NEARLY FIVE YEARS AGO WITH THE INTRODUCTION OF THE EXTRADITION ACT OF 1981. THE SENATE FOREIGN RELATIONS AND THE HOUSE FOREIGN AFFAIRS COMMITTEES AND THE SENATE AND HOUSE JUDICIARY COMMITTEES SPENT MANY HOURS REFINING THIS PROPOSAL, WHICH CULMINATED IN THE EXTRADITION ACT OF 1984. ALTHOUGH MY FRIEND AND COLLEAGUE, MR. HUGHES, WHO SERVES AS CHAIRMAN OF THE CRIME SUBCOMMITTEE, WORKED DILIGENTLY TO SEE THAT THIS PROPOSAL WAS ENACTED LAST SESSION, TIME CONSTRAINTS AS THE 98TH CONGRESS DREW TO A CLOSE PREVENTED US FROM ACHIEVING THAT GOAL.

OUR WORK TO REVISE EXISTING EXTRADITION LAW IS ALMOST COMPLETE AND WILL BE A TOP PRIORITY WITH THE HOUSE JUDICIARY COMMITTEE NEXT SESSION. THUS, I STRONGLY URGE YOU TO REJECT THE SUPPLEMENTARY TREATY AND TO WORK WITH ME AND WITH OUR COLLEAGUES IN CONGRESS TO FINISH PROMPTLY THE TASK BEGUN ALMOST FIVE YEARS AGO -- REVISION OF OUR EXTRADITION LAW ON A COMPREHENSIVE, RATHER THAN PIECEMEAL, BASIS.

PREPARED STATEMENT OF MORTON H. HALPERIN

Mr. Chairman:

I very much appreciate the opportunity to testify before this committee today on the very important question of whether this nation will abandon its two hundred year old tradition of refusing to return unsuccessful revolutionaries to their homeland to suffer victor's justice.

I appear on behalf of the American Civil Liberties Union, which, as you know, is a national membership organization dedicated to the preservation of the Bill of Rights.

The basic recommendation of the ACLU is very simple. We urge this committee to inform the administration that it will not consider the treaty until the Congress has enacted comprehensive reform legislation of the existing extradition law. The ACLU supports such legislation and is ready to work with the Congress on an expedited basis to modernize the law and insure that terrorists can be extradited without abandoning our tradition of providing safehaven to revolutionaries.

I will not attempt to present to the committee a full discourse on the role of extradition in American history or a complete discussion of issues raised by the proposed treaty. Rather I want to address two critical questions: why the treaty route is the wrong way to go in revising the extradition procedures of the United States and why, whatever method is used, the standard in this treaty is the wrong one.

First let me explain briefly why extradition is a civil liberties issue of vital concern to the ACLU. Those of us who are not lawyers tend to think of extradition as the process of

sending back to a country a national of that nation who, having been tried and convicted of a crime, has fled its jurisdiction and sought refuge in the United States. Even if that were the case, the ACLU would be concerned since every "person" within our borders is entitled to the protection of the constitution. However, extradition can reach much further than this archetypal case. A state can request the extradition of an American citizen who has never left the United States and has never even been convicted of anything, but who is simply charged with conspiring to violate the laws of the foreign nation. Such a citizen, presumed innocent under our system, can be arrested by federal law enforcement officials, held in a federal prison, and sent to the nation which demands him. To be sure, this requires the consent of a magistrate but one who must determine, only on the basis of uncorroborated testimony not subject to cross examination, if there is probable cause to believe that a crime was committed. Other than determining that the evidence is insufficient, the only significant basis for denying extradition is a finding that the crime charged is a political offense. It is that authority which the administration proposes to strip from the courts at least for the United Kingdom and other selected countries.

For these reasons the ACLU believes that the issue of extradition in general, and the treaty which is now before you in particular, raises important civil liberties issues which require full consideration by this committee. The liberty of citizens and other persons is at stake; such matters require the most careful consideration.

The Treaty Route

By committing itself to negotiating new bilateral treaties or protocols, the Administration is deliberately seeking to establish two wholly different sets of standards for defining the political defense exception to extradition. One standard is to apply to countries with a stable democratic tradition and the other to all other countries. This approach is wrong in principle and impossible to maintain in practice.

As a matter of principle the United States should maintain its tradition of providing a haven for all of those who rebel unsuccessfully against a government. We should refuse sanctuary to those who engage in wanton crimes including acts of terrorism whether they rebel against a democratic government or one which does not provide an avenue for political dissent, and we should grant sanctuary to those who rebel and do not employ such heinous tactics even if we approve of the government they are seeking to overthrow. We should leave the task of determining which revolutions are praiseworthy to history. It is not a task for bureaucrats or even current or former judges.

If one turns to the practical considerations, the danger of this approach becomes even clearer. The State Department has told this committee that it is negotiating similar treaties or protocols with some other nations, but it refuses to provide the committee with the names. The reason for this is clear. Once it is known that the United States Government is deciding which countries are stable democracies, every government allied to the United States will insist on being put on the list. Any

administration will find it very hard to resist pressure from an allied government, especially one from whom we are seeking, for example, a base renewal, to negotiate a new extradition treaty containing the narrowed political defense exception. To refuse is to assert officially either that the nation does not have a functioning democratic system with a court system that is fair, or that its institutions are subject to change. As the government so labelled will point out, such a finding would be used by the domestic opponents of the regime and those in Congress who oppose aid to that nation.

Moreover, the State Department, under any President, seems to have trouble telling a friendly government from a democratic one. Thus in the past we have been told by the Administration of the day that Nicaragua under Somoza, the Phillipines under Marcos, South Africa with Apartheid, and South Korea today are functioning democracies.

If this committee allows the administration to begin to go this route of separate treaties for democratic nations, there will be no end to such treaties. The Senate Foreign Relations Committee will need to decide on a case by case basis whether you agree with the administration that a particular country is a functioning democracy and is likely to continue to be one. It will need to be willing to hear testimony and makes judgments of the kind that I believe you must make about justice in Northern Ireland before you could consider recommending ratification of the treaty which is now before you. (In that connection, attached to my statement is a letter we've received from the English National Council on Civil Liberties assessing the system of

justice in Northern Ireland.) Moreover, you will need to decide not only if the nation's judicial system is fair, but also whether it is likely to change. I doubt that you want that task or that you should.

The alternative is, of course, to have a single standard applied by the courts against requests from all nations. That must be done by legislation and not treaty.

There are other reasons why you should reject the country by-country treaty approach. One is simply the need for the Congress to define carefully what actions it wishes to label as heinous crimes which should never be considered to be political defense exceptions to extradition. There is agreement that terrorist acts should always be subject to extradition, but differences of opinion about how to do that. The Administration's first solution was to take the authority to determine what was a political offense away from the courts and give it to the State Department which would, in its wisdom, decide. The solution which the Senate found acceptable in a previous Congress was to tell the courts that only in certain "extraordinary" circumstances should the courts determine that a violent crime is as a political offense. The House provided the courts with a definition of terrorist acts and instructed them that such acts are never to be viewed as within the political defense exception. It did not direct the courts to accept a claim that other violent acts came within the traditional definition of a political crime, but only to consider that possibility. The ACLU supports the House approach. These are

hard and difficult choices and should be settled in the give and take of the full legislative process and not by the process of ratifying a treaty with one country.

The Administration has now told this committee that it is not seeking legislation on extradition. That is, in the ACLU's view very unfortunate. Not only do we believe that there is an need to redefine the political defense exception, but also that there are a number of other desirable changes in the law.

Without reviewing all of them let me just note that under current law bail is denied to those being held for an extradition hearing except under unusual circumstances, and that such persons are held without a prior finding by a court that there is probable cause to believe that the person has committed a crime. The ACLU believes that these provisions are unconstitutional. By laying this treaty aside until the extradition laws are revised this committee would give strong impetus to resuming that process.

The Administration appears to have abandoned the legislative route only because it did not get what it wants. That is not in our system an acceptable reason to attempt an end run. There is every reason to believe that the House and Senate Judiciary Committees, which have primary jurisdiction over such legislation, would respond positively to an administration request to move a bill. The ACLU stands ready to participate actively in that process with a view towards early enactment of comprehensive extradition legislation.

The Standard

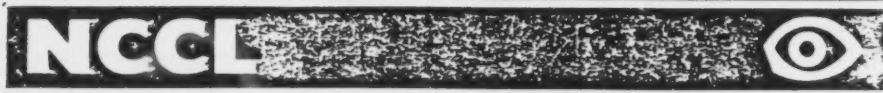
The Administration would have this committee believe that the treaty would simple require that "terrorists" not be able to benefit from the political defense exception. However, as you known, the text of the treaty does no such thing. Rather it provides that no one who is accused of participating in a crime of violence can seek to claim the political defense exception. Thus when Mr. Sofaer characterizes the treaty as specifying that "terrorists who commit the specified, wanton acts of violence" should not be able to claim the political defense exception, he misspeaks. The treaty would bar the use of the political defense exception to all who are accused of committing the specified acts and not simply those who are "terrorists." Moreover, the treaty does not identify certain "wanton" acts of violence as not subject to the political defense exception, rather it applies this prohibition to a wide range of crimes of violence without regard to whether they are "wanton."

Mr. Sofaer is more accurate when he tells you that the administration simply believes that the political defense exception should not apply to any violent crime when the request comes from a "stable democracy."

For reasons that I have already suggested this is a dangerous approach. We should provide a single standard for all persons in the United States in determining whether they can seek the protection of the political defense exception. If the Administration were actually seeking to deny the exception only to terrorists, it would be much closer to the substantive position that the ACLU would urge on the Congress.

We believe that certain acts including attacks on civilian populations are so heinous that the courts should not apply the political defense exception to those acts even if conducted for a political purpose. However, we believe that those who avoid such acts and who rebel against their government should be granted sanctuary in the United States. We should shield such persons from victor's justice and let history decide the rightness of their cause.

Mr. Chairman, let me again thank you on behalf of the ACLU for this opportunity to present our views to the committee. I would, of course, be pleased to respond to your questions now or in writing.



Morton Halperin,
Director,
ACLU Washington,
122 Maryland Avenue North East,
Washington DC 20009,
United States of America.

16 September 1985

Dear Morton Halperin,

Extradition to Northern Ireland

I write in response to your request for the opinion of this Council on the system of justice in Northern Ireland in relation to offences of political violence.

The National Council for Civil Liberties is a non party political voluntary organisation established in 1934 to defend and extend civil liberties throughout the United Kingdom. It is firmly opposed to any use of violence for political ends. It conducted its first Commission of Inquiry in Northern Ireland in 1936, which strongly criticised the then Special Powers Act, and has been closely involved in monitoring infringements of civil liberties in Northern Ireland, and campaigning in their defence, since that time. I must inform you that the powers of the police, army and government ministers in relation to Northern Ireland are far wider than in the rest of the United Kingdom and in many cases unchallengeable in the courts; while the system of justice has departed substantially from the fundamental principles of justice on which it should be based and is based in the rest of the United Kingdom.

Northern Ireland has experienced emergency legislation continuously since 1922. There are currently two pieces of emergency legislation, both of which severely restrict civil liberties: the Northern Ireland (Emergency Provisions) Act 1978 (EPA) and the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA). The most extreme provisions in these Acts are the following:

Under the EPA

i) Jury trial was abolished for those charged with terrorist offences. Defendants are tried by a single judge in a "Diplock court". There is evidence that the judges have become case hardened. The acquittal rate has declined while in the remaining jury trials it has increased.

ii) The rules of evidence have been relaxed to allow involuntary confessions obtained by inducement, threats of violence or violence, which would be inadmissible in British courts, to be admissible in Diplock courts. They are inadmissible only if obtained by torture, inhuman or degrading treatment. It has been acknowledged by a presiding judge that this provision accepts a degree of physical violence which could never have been tolerated by the courts under the common law test.

Morton Halperin

16 September 1985

iii) Defendants can and are being convicted of very serious offences, including murder, in a no-jury court on the sole evidence of an accomplice, without corroboration.

iv) Terrorist suspects can be, and were, interned without trial indefinitely. Although internment has not been used since 1975 it remains on the statute books.

v) Soldiers can arrest anyone for any offence in any part of Northern Ireland and detain them for four hours.

vi) Defendants are currently waiting excessive periods on remand before trial, frequently between one and two years, and occasionally over two years.

Under the PTA

vii) Any Secretary of State can "exclude" anyone from Britain to Northern Ireland or vice versa if he believes that person to be involved in acts of political violence related to Northern Ireland. They have :

- no right to know the evidence against them
- no trial
- no appeal.

Exclusion is the United Kingdom's own system of internal exile. It is an imprisonable offence to break the exclusion order or to help someone to do so. It uproots men and women from their jobs, homes and families without any redress. It cannot be challenged in the courts.

viii) Suspects can be held for seven days without charge for interrogation. Periodically there have been serious allegations of ill-treatment in custody, leading to a report by Amnesty International and later a government inquiry, which substantiated many of the allegations.

ix) At ports of entry the police and army can arrest anyone and hold them for twelve hours without any suspicion of involvement in crime, to question them. Those held have no right to silence - it is an offence to refuse to answer any question.

Independent research by academics for the Cobden Trust has shown that these extreme powers are open to abuse and are abused. The vast majority of those detained are not questioned about any specific offence and are released without charged, held only for information gathering. The stigma of detention under terrorism legislation remains on their file. Because of the inflexibility of the legislation, 40% of all those cases denied jury trial have been found to be for non-political offences. The long periods of detention coupled with relaxed rules of evidence have led to a heavy police reliance on confessions and a higher proportion of convictions based solely on confessions which defendants claim were involuntary and untrue. The safeguards for suspects in detention, inadequate and unenforceable as they are, do not even apply to those held by the army. Finally, we cannot know how many innocent people have been "excluded"

Morton Halperin

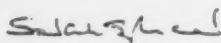
16 September 1985

as the Minister's evidence is never presented in court. Lord Fitt, however, when a Member of Parliament for a Belfast constituency, said of some of his constituents who had been excluded: "I have spoken to these people and I am convinced that they are not and never have been involved in terrorist activities in this island".

The emergency legislation has destroyed the basic safeguards developed over centuries in our legal system to protect the citizen from wrongful arrest, detention and conviction. It provides government ministers, the police and army with far wider powers than the rest of the United Kingdom and which cannot be challenged in the courts. It allows the detention and interrogation of those against whom there is no evidence at all. It allows a minister to punish an individual by totally excluding him or her from Britain or Northern Ireland on the basis of evidence which will never be scrutinised in a court of law. It removes trial by jury for the most serious offences including murder and in some circumstances denies the right to silence. It allows the police to submit evidence in court which has been obtained unlawfully through ill-treatment of the suspect. The system of justice has been grossly distorted to facilitate obtaining convictions and it cannot be said that defendants in Northern Ireland are given a trial that would be considered fair and just in your country or in Great Britain. The government has made it clear that it has no intention of removing, or substantially amending, either piece of legislation.

Finally, may I add that this Council strongly supports the political offence exception in extradition treaties. We note that the British government, in a recent policy statement (Extradition, cmd 9421, February 1985) stated with approval that "it is generally accepted that persons accused or convicted of political crimes should not be extradited". It also stated that "it is a universally accepted principle of extradition that fugitives should be surrendered only for conduct which is against the law of both the requested and the requesting states". We note that neither of these principles is adhered to in the Extradition Treaty which your Senate is currently considering and we hope that, having considered all of the arguments, the Senate will decide to reject this proposal.

Yours sincerely,



Sarah Spencer,
General Secretary

PREPARED STATEMENT OF ARTHUR C. HELTON

INTRODUCTION

Chairman Lugar, members of the Committee, thank you for inviting me to testify at today's hearing. My name is Arthur Helton. I am the director of the Political Asylum Project of the New York-based Lawyers Committee for Human Rights.

Since 1978, the Lawyers Committee has been a public interest law center working in the areas of international human rights, refugee and asylum law. The Political Asylum Project of the Committee was created in 1980 to provide legal representation to asylum seekers in the United States. The Project utilizes volunteer lawyers whom it trains and supervises. Since 1978, the Lawyers Committee has represented several hundreds of asylum applicants from over 30 countries. Based on this experience, the Committee has testified in Congress and issued papers on various asylum and refugee questions.

My testimony today concerns the Supplementary Extradition Treaty between Great Britain and the United States, particularly its reformulation of the political offense exception to extradition. Under Article 1 of the Treaty, certain offenses would be excluded from the political offense concept, including

air hijacking, offenses against diplomats, hostage-taking, murder, manslaughter, assault, kidnapping, certain offenses concerning explosives or possession or use of firearms, property damage which endangers life, and attempts to commit such offenses. This definitional approach sets a bad precedent. It is overly mechanistic in the determination of whether an offense is of such a character as to warrant an exception to extradition and creates a peculiar risk in the law -- the extradition of bona fide refugees to countries where they face persecution.

BACKGROUND

Extradition under international law is the process by which individuals charged with, or convicted of, crimes against the law of one State and found in another State may be returned to the requesting State for trial or punishment. In the United States, extradition may be granted only pursuant to a treaty.¹ There are currently in force with respect to the United States bilateral extradition treaties with 98 countries, including several countries that have been criticized for human rights

1. Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936). See 6 M. WHITEMAN, DIGEST OF INT'L LAW 727, 734 (hereinafter cited as WHITEMAN). 18 U.S.C. Sections 3181 - 3195, the current statutes governing the domestic procedures to be followed in extradition cases, provide only for the arrest, examination and extradition of a fugitive from countries with which the United States has an extradition treaty.

abuses.²

The statutory procedures for accomplishing extradition have not been substantially revised since 1882. In the 97th Congress, legislation was introduced to improve domestic implementation and reform the law of international extradition, due to the concern that the statutory scheme is antiquated and does not permit the effective processing of the growing number of extradition requests.³ While the Senate proposal was passed, the House version was not. These proposals were reintroduced in the 98th Congress in both the Senate and House, but again no bill was passed.⁴ The Administration now seeks to accomplish reform on a treaty-by-treaty basis, specifically seeking to redefine the concept of political offense as a defense to extradition. If entered into force in its present form, this treaty would eviscerate the political offense exception as developed by British and American courts over the past century. This approach should be rejected, and it should be made clear that courts are

2. As of January 1, 1982. U.S. Dept. State, Treaties in Force; 18 U.S.C. Section 3181. Countries with significant human rights abuses include El Salvador, Poland, Haiti and Cuba.

3. See H. Rep. No. 97-627, Part I, Extradition Act of 1982, 2d Sess. 2 - 3 (1982). The bills were H.R. 6046, 97th Cong., 2d Sess. (1982) and S. 1940, 97th Cong., 2d Sess. (1982).

4. H.R. 2643, 98th Cong., 1st Sess. (1983), re-numbered H.R. 3347; S. 1762, 98th Cong. 1st Sess. (1983).

warranted in using a flexible approach in analysing the availability of political offense defense, using a number of factors, including the nature of the crime, the political motive of the individual, and the relationship between that motive and the end sought to be achieved by committing the offense. This approach will have the desirable effect of reconciling the law of international extradition and asylum as regards to whether the alien has committed an offense deemed political under our immigration laws.

THE POLITICAL OFFENSE EXCEPTION

a) Current Law

A person whose extradition is sought abroad may not be extradited unless a United States court finds that there is sufficient evidence to support a complaint under the provisions of the applicable treaty. Such person is permitted to raise as a defense the fact that the offense in question was political in character. The rationale for this exception is that the State from which extradition is requested should not be required to take a position or participate on one side or another of a State's political dispute,⁵ and its effect is comparable to an

5. See H. Rep. 97-627, Part I, at 23 (1982).

award of asylum.⁶

No definitive definition of what constitutes a "political offense" exists either in statutory form or in case law. However, in legal theory a political offense is generally categorized as either a "pure political offense" or a "relative political offense." A pure political offense is an act that is facially directed against a State, such as sedition, treason, or espionage, and does not contain an element of ordinary crime. A relative political offense is a traditional criminal act that is so connected with a political motive or act that the entire offense is regarded as a political one. Current American law provides that either type of political offense can provide a defense to an extradition request.⁷ Almost all cases where a court in the United States has been called upon to determine the issue have involved common crimes and an analysis of the relative political offense. Traditionally, British, and later American courts, have identified a number of factors for consideration, and examined each case on its own facts and circumstances.

The standard employed by United States courts to

6. In fact, the origin of the political offense exception may be traced to Belgium in the Extradition Law of 1833 which codified a right of "political asylum." 6 M. WHITEMAN, DIGEST OF INT'L LAW 800-802.

7. 6 WHITEMAN at 799-804.

determine whether extradition should be refused on the grounds that the offense in question is a political one is derived from a leading nineteenth century British case, In re Castioni,⁸ which provided that such offenses must be "incidental to and [have] formed a part of political disturbances." Relatively few American courts have addressed this issue recently, and either granted⁹ or denied¹⁰ extradition. Two recent American cases,

8. [1891] 1 Q.B. 149.

9. See Matter of Ziyad Abu Eain, Magistrate No. 79M175 (N.D. Ill. December 18, 1979), slip op., habeas corpus denied, Abu Eain v. Adams, 529 F. Supp. 685 (N.D. Ill. 1980), aff'd sub nom. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), cert denied, 454 U.S. 894 (1981). Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980); Matter of Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979); Matter of Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), aff'd sub nom. Sindona v. Grant, 619 F. 2d 167 (2d. Cir. 1980); Jhirad v. Ferrandina, 536 F. 2d 478 (2d Cir. 1976); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971); Matter of Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963); Jimenez v. Aristeguieta, 311 F.2d 547 (2d. Cir. 1962).

10. See In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); Matter of Mackin, No. 80 Cr Misc. 1, slip op. (S.D.N.Y. Aug. 13, 1981), habeas corpus denied, 668 F.2d 122 (2d. Cir. 1981); Matter of McMullen, No. 2-78-1099 MG, slip op. (N.D. Cal. May 11, 1977), aff'd, 658 F.2d 1312 (9th Cir. 1981); Matter of Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960); Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), rev'd sub nom. Ivancevic v. Artukovic, 211 F. 2d 565 (9th Cir.), cert. denied, 348 U.S. 818, rehearing denied, 348 U.S. 889 (1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), aff'd sub nom. Karadzole v. Artukovic, 247 F. 2d 198 (9th Cir. 1959), vacated on other grounds, 355 U.S. 393 (1958), decision on remand sub nom. United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

Matter of Mackin.¹¹ (a 1981 case in which extradition was denied) and Eain v. Wilkes¹² (a 1981 case in which extradition was permitted), serve to illustrate the prevailing formalistic standard.

Mackin involved a request by the United Kingdom for the extradition of a member of the Provisional Irish Republican Army (PIRA) for the attempted murder of a British undercover soldier. In Mackin, the court reviewed the case law and distilled the following factors to determine whether the offense in question was political:

1. whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense;
2. whether Mackin was a member of the uprising group; and
3. whether the offense was "incidental to" and "in furtherance of" the political uprising.¹³

 11. No. 80 Cr. Misc. 1, Slip op. at 54 (S.D.N.Y. Aug 13, 1981), habeas corpus denied, 688 F. 2d 122 (2d Cir. 1981).

12. 641 F.2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

13. 668 F.2d at 125.

As to the existence of a political uprising, the court concluded that "...there was a political conflict in Andersontown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception.¹⁴ The court's determination was based on:

1. the high level of violence in the area at that time;
2. the presence of 13,000 British troops, 420 of whom were stationed in Andersontown to contain the violence;
3. the existence of three British army forts in the immediate locale;
4. the establishment of special non-jury courts by emergency legislation to deal with the rise in terrorism;
5. the derogations filed by the United Kingdom from the European Convention on Human Rights to allow it to forego its obligations thereunder by virtue of the existence of a "public emergency threatening the life of a nation;" and
6. the campaign of violence maintained by the PIRA aimed at

 14. No. 80 Cr. Misc. 1, Slip op. at 54 (S.D.N.Y. Aug. 13, 1981).

British army and Loyalist forces, against the British Dominion of Northern Ireland, and in support of a unified, independent Irish nation.¹⁵

As to Mackin's membership in the uprising group, the court found that the requisite connection to the group had been established. The alleged acts were in conformity with a member's general function in the PIRA, and Mackin "bore no personal ill-will or malice toward the victim-soldier."¹⁶

As to the question of whether the act was "incidental to" and "in furtherance of" a political disturbance, the court found that while the acts had not been "pre-planned and directed by the PIRA" the requisite "substantial tie" between the alleged offense and the political activity and goals of the group had been shown in the "necessity of the situation."¹⁷

The second case, Eain v. Wilkes¹⁸ involved a Jordanian national and a member of the Fatah faction of the Palestine Liberation Organisation (PLO) whose extradition to

15. Id.

16. Id.

17. Id.

18. 641 F.2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

Israel was requested on charges of murder and aggravated harm. Eain was alledged to have planted a bomb in the market area of Tiberias during a Jewish religious festival and youth rally. The blast had killed two boys and maimed and injured 36 other persons.

As to the political disturbance requirement, the court noted that it must constitute a "war, revolution or rebellion."¹⁹ The court distinguished the nature of the conflict in Israel from other disturbances where the political offense exception had been sustained, explaining that those "cases involved ongoing, organized battles between contending armies, a situation which, given the express nature of the PLO, may be distinguished."²⁰

As to the question of whether or not the act was "incidental to" and "in furtherance of" a political uprising, the court held that there had been a failure to prove a direct link between the bombing and the political goals of the PLO. The individual's motives in committing the offense, furthermore, were held to have no bearing on the political character of the act.²¹

19. Id. at 519.

20. Id. at 519.

21. Id. at 520.

The applicability of the political offense exception to terrorist attacks was limited in Eain as well. The court relied on another nineteenth-century British case, In re Meunier, which excluded from acts classified as "political offenses" those which are "directed primarily against the separate body of citizens."²² In re Meunier involved a bombing of an army barracks and a Parisian cafe by an anarchist. The political offense exception was held not to apply in that case on the ground that "the party of anarchy is the enemy of all government."²³ In relying on this precedent, the court in Eain identified the following factors as relevant to its determination:

1. the civilian status of the victims and the randomness of their selection; and
2. the objectives supposed common to both terrorist and anarchist activity, namely "the destruction of a political system by undermining the social foundation of the government."²⁴

 22. Id. at 521, citing In re Meunier, [1894] 2 Q.B. at 419.

23. Id. at 521.

24. Id. at 521.

The court drew the distinction between terrorist activity and activity eligible to be classified as political as the difference between "acts that disrupt the political structure of the state," and those that disrupt "the social structure that established the government."²⁵ Terrorist activity, unlike political activity conforming to the test, "seeks to promote social chaos," in contrast to activity occurring in the context of "[a]n ongoing, defined clash of military forces."²⁶

The court applied these principles and found that the bombing failed to qualify as a political offense because of its specific character as an "isolated act of violence." The PLO, the court found, "directs its destructive forces at a defined civilian populace" to further its aim of "[destroying] the Israeli political structure as an incident of the expulsion of a certain population from the country."²⁷ There was no proof that the bombing was linked to PLO political and strategic objectives, particularly in view of the "terroristic" character of those objectives.

While commentators have found inconsistencies in these

25. Id. at 521.

26. Id. at 521-522.

27. Id. at 520 n. 19.

decisions, Mackin and Eain, both illustrate the formalistic approach that courts have taken to resolve the "political offense" issue.

In the United Kingdom, as in the United States, neither Parliament nor the courts have attempted to create an all-encompassing definition of what constitutes a political offense.²⁸ After the Castioni decision, British courts followed the "political disturbance" test enunciated in that case, and did not re-examine this standard until 1955, in R. v. Governor of Brixton Prison ex parte Kolczynski.²⁹ In this case the court was called upon to determine whether several Polish sailors, who had put the ship's captain and several crew members under restraint so as to bring the ship into an English port for the purpose of seeking asylum, were political offenders. Poland's extradition request included a charge of assault on the high seas. If Castioni and Meunier were controlling, the seamen would have had to show that they were participants in a political uprising relating to the Polish government. It was admitted that in 1955 there was no such political uprising, nor any organized internal opposition to the Polish government. The applicants contended,

28. For a discussion of the political offense in British law, see A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 169-178 (1971).

29. [1955] 1 Q.B. 540.

however, that a broader meaning should be assigned to the concept of "political offense" in light of the world's changed political conditions. The court accepted the argument that the views expressed in Castioni and Meunier be read in the political context of their time, and determined that the crimes for which extradition was requested were political in character, denying the request.

Kolczynski was preceded by a Swiss case based on similar facts, where a Swiss Federal Tribunal denied an extradition request by Yugoslavia to return three crew members who had hijacked a Yugoslavian plane to Switzerland for the purpose of seeking asylum.³⁰ In this case the Swiss court said, "[i]n matters of extradition in particular, the Court must not abandon [the] spirit [of justice] in favor of legalistic constructions, and must take account of historical and political developments. . . ."³¹ The court used a means-end balancing test in analyzing the political character of the offense:

In this connection there can also be applied the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private

30. Re Kavic, 78 (1952) Arrets du Tribunal Federale Suisse I at 39, reprinted in 19 INT'L L. REP. 371 (Swiss Federal Tribunal, (1952)).

31. 19 INT'L L. REP. at 374.

property, and to make the offender appear worthy of asylum. Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the other hand, the offences against the other members of the crew were not very serious, and on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commission of these offences.³²

A comparison of these cases shows that while United States courts have adhered closely to the standards enunciated in the nineteenth century in Castioni and Meunier, British courts, as well as those of other jurisdictions, have been more willing to abandon their older precedent, and view the exception in the political context of the period in question. The varied fact situations, the change in political climate, and the differing circumstances of each of these cases -- factors weighed by the courts in each case -- support the view that a precise formulation of what constitutes a political offense is neither feasible nor desirable.³³

b) Political Offense under the Treaty

32. Id.

33. Viscount Radcliffe stated in R. v. Brixton Prison Governor ex parte Schtraks, [1963] 1 Q.B. 55, that "[i]deed it has come to be regarded as something of an advantage that there is no definition. I am ready to agree in the advantage so long as it is recognized that the meaning of such words as "political offense," while not to be confined within a precise definition, does nevertheless represent an idea which is capable of description and needs description if it is to form part of the apparatus of a judicial decision."

Under the Supplementary Treaty Concerning the Extradition Treaty between Great Britain and the United States, the drafters, instead of attempting a positive definition of a political offense, create a class of exceptions to the defense. Article 1 provides that. . . "none of the following offenses shall be regarded as an offense of a political character:"

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
- (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
- (c) an offence within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;
- (d) an offence within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;
- (e) murder;
- (f) manslaughter;
- (g) maliciously wounding or inflicting grievous bodily harm;
- (h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
- (i) The following offences relating to explosives:
 - 1. the causing of an explosion likely to endanger life or cause serious damage to property; or
 - 2. conspiracy to cause such an explosion; or
 - 3. the making or possession of an explosive substance by a person who intends either himself or through another person to endanger

life or cause serious damage to property;

(j) the following offences relating to firearms or ammunition:

1. the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
2. the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

(l) an attempt to commit any of the foregoing offences.

The crimes relating to hijacking and terrorism are already the subjects of treaties to which the United States is a party.³⁴ In the present form, the treaty ignores existing judicial precedent, both American and British, since the facts of

34. Five conventions dealing with terrorism are currently in force with respect to the United States: Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo 9/14/1963 (20 U.S.T. 2941; T.I.A.S. 6768; entered into force in the U.S. on 12/4/1969); Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), done at the Hague 12/16/1970 (22 U.S.T. 1641; T.I.A.S. 7192; entered into force in the U.S. on 10/14/1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), done at Montreal 9/23/1971 (24 U.S.T. 564; T.I.A.S. 7570; entered into force in the U.S. on 1/26/1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted by the U.N.G.A. 12/14/1973 (28 U.S.T. 1975; T.I.A.S. 8532, entered into force in the U.S. on 2/20/1977; and the O.A.S. Convention on Terrorism, done at Washington 2/2/1971) (27 U.S.T. 3949; T.I.A.S. 8413; entered into force in the U.S. on 10/20/1976).

each case discussed above revolve around a crime where assault, homicide, unlawful detention, or other violence was used. It leaves intact the present formalistic inquiry into whether an offense is a political crime, without providing standards to determine the issue. Such a change would not bring clarity to this complex area; it merely superimposes a mechanistic test -- that of classifying the purported crime by type of act -- on the current formalistic approach with respect to Great Britain.

c) Recommendation

Since almost all of the crimes which were considered of a political nature under judicial precedent involved some form of violence, the removal of this class of crime from the exception effectively vitiates the defense except in narrow circumstances. We do not feel this should occur. Instead, we recommend that the standard by which courts should determine whether the political offense exception applies should be less mechanistic -- both in terms of existing case law, and in terms of the supplementary treaty formulation -- and should focus more upon the individual facts, circumstances and motives in question.

As Mackin and Eain show, U.S. courts have agonized over whether there is the requisite "political uprising" and whether an offense, including terrorist activity, is sufficiently

related to any such uprising. A more flexible approach is warranted. In particular, the inquiry should focus upon the nature and purpose of the offense in question, including motive; and the relationship between the offense and its alleged political purpose and objective, including whether the offense is grossly out of proportion to the alleged objective. These factors would accommodate the concerns that have been expressed by the courts.

The decision whether to withhold extradition is many times inextricably related to the decision whether to grant political asylum in the United States to an alien who has been convicted of a crime. We find it helpful to refer, therefore, to the standards and procedures by which it is determined whether a crime is political in nature and, therefore, does not preclude a grant of asylum or withholding of deportation.

An alien merits political asylum in the United States if he or she has been persecuted or has a well-founded fear of persecution upon return to the home country on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁵ When an alien is in exclusion or deportation proceedings before an immigration judge applies for

35. 8 U.S.C. Sections 1101(a)(42), 1158. See INS v. Stevic, 104 S. Ct. 2489 (1984).

asylum, his application "shall also be considered" as a request for "withholding exclusion or deportation pursuant to section 243(h)" of the Immigration and Nationality Act.³⁶ Section 243(h) provides that the Attorney General "shall not deport or return" any alien to a country where his life or freedom would be jeopardized by persecution.³⁷ An application for asylum or request for withholding of deportation, however, can be denied if there are "serious reasons for considering that the alien has committed a serious non-political crime outside the United States...."³⁸ Conversely, the commission of a political offense does not preclude a grant of asylum or withholding of deportation.

The statute and regulations do not define what constitutes a serious, non-political crime. The leading administrative case, Matter of Rodriguez-Palma,³⁹ involved a

36. 8 C.F.R. Section 208.3(b).

37. 8 U.S.C. Section 1253(h). The provisions of the Act concerning refugee status and withholding of deportation are the national law correlatives to the pertinent part of Articles 1 and 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, to which the United States became a party in 1968. 19 U.S.T. 6223, T.I.A.S. 6577.

38. 8 U.S.C. Section 1253 (h)(2); 8 C.F.R. Section 208.5(f)(v). This exclusion provision corresponds to an exclusion clause under Article 1 of the United Nations Convention and Protocol.

39. 17 I. & N. Dec. 465 (B.I.A. 1980).

39-year-old Cuban who was part of the Mariel influx. The alien applied for political asylum and withholding of deportation, admitting that while in Cuba he had been convicted of drug trafficking in 1962, robbery in 1968, and robbery again in 1978. An immigration judge denied asylum and withholding of deportation and the alien appealed. The Board of Immigration Appeals affirmed, holding that the alien had committed a serious non-political crime within the meaning of the withholding statute. The Board explained that it had looked to the United Nations' High Commissioner's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979) ("Handbook") in order to decide the case.

The Handbook provides guidance in the form of factors to be weighed in determining what constitutes a political offense. It states in pertinent part:

* * *

In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose, i.e., whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts

committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

* * *

What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.

* * *

In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.⁴⁰

The Handbook recognizes that aliens may be charged with crimes by their governments as a pretext for persecution, and

40. Paragraphs 152, 155-156.

that certain types of offences, in any event, cannot overcome a well-founded fear of persecution as a refugee.

At the time the Handbook was released -- in September, 1979 -- anti-hijacking and anti-terrorist treaties were already in force in many countries, including the United States. The United Nations High Commissioner for Refugees was cognizant of, and sensitive to, the obligations of States party to these conventions with respect to their duty to extradite aliens charged with offences covered thereby. Thus the Handbook states:

....None of these instruments mentions refugees.⁴¹ However, one of the reports leading to the adoption of a resolution on the subject states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States under instruments relating to the status of refugees and stateless persons." Another report states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States with respect to asylum. . . ."

* * *

The various conventions adopted in this connexion deal mainly with the manner in which the perpetrators of such acts have to be treated. They invariably give Contracting States the alternative of extraditing such persons or instituting penal proceedings for the act on their own territory, which implies the right to grant asylum.

41. The Handbook here is referring exclusively to crimes of hijacking and the Hague, Montreal and Tokyo conventions relating to hijacking. The OAS Convention on Terrorism explicitly provides, in Article 6, that none of that treaty's provisions are to be interpreted "so as to impair the right of asylum."

* * *

While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded, will have to be duly considered in determining his possible refugee status under the 1951 Convention. The question of the exclusion under Article 1F(b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case.⁴²

This view of the treaties is consistent with that put forth by commentators.⁴³

Where extradition is denied for an offense covered by one of these treaties, the requested State is obligated to prosecute the offender in accordance with its national laws. In this connection, Congress has adopted legislation to execute these treaty obligations into domestic law.⁴⁴ International law

42. Paragraphs 159-161.

43. See, e.g., Shubber, Aircraft Hijacking Under the Hague Convention 1970-A New Regime?, 22 INT'L & COMP. L.Q. 687 at 722-723 [where the author concludes: ". . . a State party to the Hague Convention can refuse to extradite a hijacker any may even grant him political asylum in spite of the extradition arrangements provided thereunder. Indeed, as one commentator put it, 'a Convention that contained an iron-clad, general provision for automatic extradition of all hijackers without exception would not be likely to gain general acceptance within the international community.'"].

44. See, e.g., 18 U.S.C. Section 1116 (Murder or manslaughter of foreign officials, official guests or internationally protected persons); Antihijacking Act of 1974 (P.L. 93-366); and Act for

thus does not require extradition for this class of crimes irrespective of the individual's motives and the particular circumstances of the case, including, for example, escape from persecution. Indeed, such a view would conflict with international obligations with respect to refugees. A better approach, and one which reconciles our differing international obligations, is to move away from the narrow tests enunciated in Castioni and Meunier, and utilize the flexible approach outlined above. This approach will take into account the magnitude of the crime, and its relationship to persecution. Further, as part of our law, courts are fully capable of analysing and applying our treaty obligations when the issue presents itself, and this will presumably be weighed by the courts when faced with an alien who has committed an offense covered by an anti-terrorist treaty.

the Prevention and Punishment of Crimes Against Internationally Protected Persons (P.L. 94-467).

CONCLUSION

Hard cases not only induce courts to make "bad law," they provoke extreme responses by policy-makers. A good illustration of this precept is provided in the consideration by this Committee of the new supplementary treaty between the United States and Britain which would deny an individual a defence to extradition even when the offense in question is "political." It provides a dangerous precedent.

Terrorism is an abhorrent activity with no place in civilized society. Care must be taken, however, to ensure that vital human rights are not lost in the struggle against terrorism.

Barring an individual from the right to defend against extradition on the grounds that the offense was political (e.g., possessing a firearm, assaulting a guard or commandeering a vehicle to escape from a gulag), and then ousting the federal courts from independently reviewing this decision raises grave risks of injustice.

Such a treaty presupposes that the process by which an individual is charged is fair, and the resulting indictment legitimate. However, this is many times not the case, and refugees may be extradited to face persecution in their home

countries. This danger has not been fully appreciated by the Administration witnesses who have testified before this Committee on this issue.

Exiled Philippine and Pakistani activists report facing bogus criminal charges lodged against them by the government, as have South Africans working against apartheid and Guatemalan nationals. The "foxhole" used by terrorists may sometimes be the escape hatch needed by those fleeing persecution.

In pursuit of "larger aims," any government can be guilty of overlooking the interests of individuals. Extradition, however, should not become subject to the unreviewable whim and caprice of foreign relations concerns, without regard for an individual's plight. Such an outcome would be unjust and inhumane.

AHPM001

PREPARED STATEMENT OF DAVID CARLINER

I Introduction

The International Human Rights Law Group [Law Group] is a public interest law center based in Washington D.C. The program of the Law Group includes the promotion of human rights norms as evidenced by international conventions and customary international law. In this capacity, the Law Group seeks to encourage the use of internationally recognized human rights norms and international law principles in the formulation of United States law and policy. The Law Group has actively participated in the shaping of United States human rights legislation to ensure that human rights concerns are considered in the formulation of policy.

The issue of extradition implicates human rights; thus, it has been of some concern to the Law Group. I testified on behalf of the Law Group before the House Subcommittee on the Judiciary in January 1982 concerning the Extradition Reform Act of 1981.

In addition, at the invitation of the Federal District Court in Ohio, the Law Group appeared as expert witness on the international law issues in a case involving an extradition request by Israel for an individual charged with murdering civilians at the Tremblinka concentration camp during World War II.¹ The Law Group argued, and the court agreed, that the mass murder of civilians has always been a crime under the law of civilized nations, and thus, Israel's law did not create a new crime *ex post facto*. Also, the Law Group argued that any state can exercise criminal jurisdiction to prosecute one who is considered *hostis humani generis*--an enemy of all mankind. For those interested, the district court granted the extradition request, and the case is now on appeal before the United States Court of Appeals for the Sixth Circuit.

We wish to thank the panel for inviting the Law Group to testify on the important matter of the Supplemental Treaty concerning extradition between the United Kingdom and the United States [Supplemental Treaty]. We will not attempt to repeat the testimony of other witness

concerning the current state of domestic extradition law. Rather, we will focus our testimony on the international law aspects of extradition and the human rights implications of the Supplemental Treaty before the Senate.

In summary, it is our view that the political offense exception represents the general rule in international law. Unwarranted limitations placed on the exception compromise the values and policies underlying the exception, which, we believe, are values that have been historically protected by the United States. These reasons include refusing to extradite a person who faces persecution, refusing to participate in "victor's justice," abandoning a position of neutrality in foreign domestic disputes, and protecting political fugitives from mistreatment by foreign judicial systems. Moreover, unnecessary compromise of the political offense exception will encroach on internationally recognized human rights; in particular, extradition raises issues concerning protections from persecution, rights to a fair trial, and rights to freedom of expression. Thus, although we accept in principle the value of formulating a policy to ensure swift and certain punishment for terrorist acts, the Law Group believes that the United States must carefully craft this policy to reconcile the need to fight terrorism with the need to protect political expression and individual liberties.

The Supplemental Treaty in our view does not accomplish this necessary balance. The Supplemental Treaty would severely limit the use of the political offense exception in extradition proceedings through its overbroad definition of crimes not included in the political offense exception and its failure to provide any safeguards for consideration of individual human rights. The Law Group believes that this balance may be best achieved through a neutral, legislative approach, not through a series of *ad hoc* treaties negotiated by interested branches of government. In this respect, legislative attempts similar to those in the past should be pursued. Furthermore, any attempt to bring about reform of the political offense exception

must pay due respect to the law and underlying policy developed through the courts in the United States. The Law Group endorses the law as developed in the courts, and it urges codification of the political offense exception as judicially developed in lieu of its virtual elimination through the treaty approach.

II The Role Of International Law.

International law has played and must continue to play an important role in shaping United States public policy. As a party to the Charter of the United Nations, the United States accepts an obligation to promote and encourage respect for human rights.² The United States has accepted a similar obligation as a party to the Charter of the Organization of American States.³ Further, although the Senate has not yet given its advice and consent to ratification, the United States has an obligation to act in accordance with the principles set forth in the human rights treaties signed by President Carter in 1977. Moreover, United States courts have established the use of international law in "informing" constitutional and statutory interpretation.⁴ Finally, the Law Group believes that the United States should constantly strive to recognize international human rights norms to strengthen respect for these norms by other countries.

III The Political Offense Exception in International Practice.

The political offense exception represents the general rule of international law. I will not repeat the testimony of previous witnesses as to the historical development of the exception. Although not technically binding on the United States under international law, the political offense exception's standing in international law is evidenced by the fact that a majority of all bilateral extradition treaties in force between countries other than the United States include

political offense exceptions.⁵ The United States also has included the political offense exception in a substantial majority of the more than 85 bilateral extradition treaties to which it is a party.⁶

Similarly, multilateral treaties concerning extradition have generally included an exception for offenses of a political character. The European Convention on Extradition,⁷ Article 3, excludes political offenses as extraditable crimes except when the crime involves the assassination or attempted assassination of a head of state or a member of his family. The Additional Protocol to the European Convention on Extradition⁸ further narrows the political offense exception by excluding certain crimes of humanitarian concern--genocide and parts of the 1949 Geneva Convention--from the political offense definition.

Treaties in the Inter-American system similarly recognize the political offense exception.⁹ For example, The Inter-American Convention on Extradition¹⁰, Article 4, includes a political offense exception. The 1933 Convention on Extradition¹¹ contains a political offense exception with the limitation that an attempt on the life of a head of state or his family will not constitute a political offense. Other multilateral treaties that contain political offense exceptions are: Benelux Convention on Extradition and Judicial Assistance in Penal Matters¹²; The Nordic States Scheme and Nordic Treaty of 1962¹³; Arab League Extradition Agreement¹⁴; and Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth¹⁵. The United States should carefully consider the implications of deviating from this established principle of international policy.

The rise of international terrorism has resulted in a number of conventions that attempt to deal with acts of terrorism. Conventions have been prepared and ratified by the United States, among others, that deal with hijacking, the safety of civil aviation, internationally protected persons, and the taking of hostages. The Supplemental Treaty specifically states that offenses

within the scope of these four conventions shall not be considered as an offense of a political character. To this extent then the Supplemental Treaty conforms with the evolving nature of the international principles of extradition. One should note, however, that none of the four conventions excludes or limits the political offense exception.¹⁶

The most comprehensive attempt to deal with the issue of extradition for acts of terrorism is the 1977 European Convention on the Suppression of Terrorism.¹⁷ It should be noted at this time that the 1977 Convention supercedes the European Convention on Extradition to the extent that it governs extradition for terrorist acts.¹⁸ The 1977 Convention has sparked a considerable amount of controversy in the European scholarly community. On the one hand, supporters argue that the 1977 Convention provides an indispensable tool to fight international terrorism. On the other hand, opponents argue that the convention will result in the end of political asylum in Europe.¹⁹

The Supplemental Treaty parallels in part this convention, but its overall scope far exceeds the 1977 Convention provisions. Article 1 of the 1977 Convention requires exclusion of offenses governed under the conventions concerning hijacking and aircraft from the political offense exception. Moreover, Article 1 compels exclusion from the political offense exception crimes of a serious nature involving internationally protected persons, crimes involving kidnapping or hostage taking, and crimes "involving the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb if this use endangers persons." Article 2 of the 1977 Convention grants discretion to contracting states to decide whether certain other violent crimes are of a political character.

The Supplemental Treaty excludes, to one degree or another, crimes from the political offense definition similar to those in the 1977 Convention. However, the Supplemental Treaty defines these offenses in a much broader fashion. For example, the 1977 Convention would make

extraditable the use of an automatic firearm that endangers persons, but the Supplemental Treaty would require extradition for even the mere possession of any firearm with the intent to endanger life. Since a country seeking extradition can easily include an allegation regarding "intent," and a United States court is not authorized to assess the particulars of the request, the Supplemental Treaty would permit a country to gain extradition over any individual accused of possession of a firearm. Furthermore, Article 2 of the 1977 Convention, granting discretion to contracting states to decide whether certain violent crimes are of a political character, incorporates entirely the political offense exception for crimes, such as murder, that are extraditable under the Supplemental Treaty.

Beyond the overbroad definition of crimes, the Supplemental Treaty fails to provide any safeguards for the policies underlying the political offense exception. In contrast, the 1977 Convention provides protections for due process and considerations of political expression. Article 13 allows contracting states to reserve the right, at the time of ratification, to refuse extradition for crimes falling under Article 1 if it considers the crime to be of a political nature provided that any state that seeks to deny extradition for political offenses must consider: (a) whether "it created a collective danger to the life, physical integrity, or liberty of persons; (b) that it affected persons foreign to the motives behind it; or (c) that cruel or vicious means have been used in the commission of the offense." Italy, and Norway have made reservations under Article 13, and France has stated that it would make necessary reservations to ensure that human rights will be respected.

IV Human Rights Considerations.

The principal reason for refusing to extradite those who are accused of political offenses derives from the belief that a person should not be persecuted for his political beliefs. Further

reasons for the political offense exception include reluctance to participate in "victor's justice," an unwillingness to take sides in another country's domestic disputes, and a concern for the mistreatment of political fugitives by the judicial systems of states with little respect for individual rights and freedoms. The Supplemental Treaty would undermine the political offense exception and consequently the values underlying the exception.

Representatives from the Reagan Administration argued, before this Committee, that the law of asylum would provide an adequate safety net for persons who would be extradited to face persecution. We disagree. Practice in the area of asylum and refugee law reveals that decisions to grant asylum or refugee status are often heavily influenced by political and foreign policy considerations. This influence is inherent in the process, which requires an "advisory opinion" from the Bureau of Human Rights and Humanitarian Affairs. The result is that the determination of who is entitled to refugee and asylee status is inconsistent.²⁰ A high income ballerina with no previous evidence of persecution in the Soviet Union is granted immediate refugee status; a poverty-stricken Haitian who has been punished capriciously by the ton-ton macoutes is not. Thus, removal of political offense exception works only to remove a vital protection against sending a person back to face persecution.

Extradition raises the need to investigate human rights protections in requesting States, but the Supplemental Treaty imposes no obligations on either State to account for human rights. In a number of cases, the European Commission on Human Rights has stated, *in dictum*, that extradition in certain circumstances may constitute inhuman treatment under Article 3 of the European Convention on Human Rights.²¹ Such circumstances may include extradition where the fugitive would face persecution, political reprisals, or exaggerated sanctions.

Under United States case law, in making an extradition determination the magistrate does not carry out a trial, nor may he explore the procedures to which the accused would be

subjected if extradited. In particular, the requesting State need not show that the fugitive will be accorded the full panoply of procedural safeguards that would characterize a trial in the United States. However, as the Law Group argued in Demjanjuk, the Law Group believes that a court may and indeed must consider allegations, made in a proper context, that the requesting State would blithely ignore even the most basic due process rights.²² The Supplemental Treaty provides no such protections.

While the Law Group has not undertaken studies on the problems of Northern Ireland, other reputable human rights organizations, such as the International League for Human Rights, have found serious problems regarding the administration of justice in Northern Ireland. Thus, extradition under the Supplemental Treaty may result in human rights abuses. For example, the European Court of Human Rights found instances of inhuman, degrading treatment and torture in Northern Ireland.²³ Amnesty International stated in its 1984 Report that proceedings in "Diplock courts" might not conform to international standards for fair trial." The court in Doherty noted: "It is significant of course that the discretion vested in the prosecution by the emergency legislation to try offenders in the Diplock Courts is indeed exercised on the basis of a determination that what would otherwise be common law offenses are politically motivated."²⁴ In other words, the Supplemental Treaty, by providing no protection for crimes of a political character, raises the possibility that prosecution for political opinion may occur.

Finally, the Supplemental Treaty will place pressures on the United States to negotiate similar treaties with other countries. As much as the United States would want to deny it, the fact remains that some of our "allies"--South Africa, the Philippines, South Korea, and Chile, to name a few--are infamous in the area of human rights. If the Senate gives its advice and consent to ratification of the proposed Supplemental Treaty, it would be establishing a dangerous

precedent for the negotiation of similar treaties with countries that are known for abuse of individuals. The political offense exception in extradition treaties provides an indispensable safety net that provides the United States discretion in dealing with foreign governments. By eliminating the political offense exception, the United States may become an active participant in the abuses of human rights carried on by these countries.

V Conclusion.

In conclusion, the Law Group believes that the Supplemental Treaty represents an overbroad attempt to deal with the difficult problem of terrorism. The Law Group supports attempts to bring this urgent problem under control. Indeed, terrorism threatens the right to life and the right to security of the person, two of the most fundamental rights recognized by the various human rights instruments. However, the political offense exception represents the general rule of international law. Accompanying this rule are important values that the United States has historically guarded. The elimination of this exception in the Supplemental Treaty poses dangers to individual liberties and human rights. Therefore, the Law Group urges that attempted reform of the extradition law be made cautiously and with due regard for the human rights the exception protects.

Notes

1. See, *In re Demjanjuk*, ____ F. Supp. ____ (N.D. Ohio 1985).
2. U.N. Charter Art. 1(3).
3. O.A.S. Charter Art. 3(j).
4. *United States v. Guy W. Capps*, 294 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955).
5. Note, Extradition Reform and the Statutory Definition of Political Offenses, 24 Yb. J. Int'l L. 419, 421 (1984); Van den Wijngaert, The Political Offense Exception 1 (1980).
6. See J. Kavass & A. Sprudzs, *Extradition Law and Treaties--United States* (1979).
7. Dec. 13, 1957, Europ. T.S. No. 24, 359 U.N.T.S. 273.
8. Oct. 15, 1975, Europ. T.S. No. 86.
9. R. Lillich, *Transnational Terrorism: Convention and Commentary* 146 (1982).
10. Feb. 25, 1981, O.A.S. Doc. OEA/Ser.A/36 (SEPF).
11. Dec. 26, 1933, 49 Stat. 3111 (1935), T.S. No. 95, 165 L.N.T.S. 45 (entered into force for the United States July 13, 1934).
12. June 27, 1962, [1962] *Trb. nr.* 97, at 1-10, *Benelux Publicatieblad* 22 (1960-62), Art. 3.
13. Mar. 23, 1962, 434 U.N.T.S. 145, Sec. 4.
14. Sept. 14, 1952, reprinted in 159 B.F.S.P. 606 (1952), Art. 4.
15. H.M.S.O., London, Cmd. 3008 (1966), S 9.
16. Van Den Wijngaert, supra note 5, at 148-49.
17. Jan 27, 1977, reprinted in 15 *Int'l Legal Materials* 1272 (1976) [1977

Convention].

18. Lillich, supra note 9, at 143.
19. Van Den Wijngaert, supra note 5, at 150-51.
20. See Carliner, Domestic and International Protection of Refugees, in Guide to International Human Rights Practice 264-65 (Hannum, ed. 1984).
21. See e.g., X v. Belgium, 4763/71, 37 Collection of Decisions 157, 158; X v. Belgium, 5012/71, 40 Collection of Decisions 53, 62.
22. See Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
23. Ireland v. United Kingdom, 2 E.H.R.R. 25, 79 (1978).
24. In re Doherty, 599 F. Supp. 270, 277 n.5 (S.D.N.Y. 1984)(Citations omitted).

PREPARED STATEMENT OF FRANK DURKAN

Mr. Chairman and Members of the Committee, thank you for this opportunity of presenting my views in opposition to the Supplementary Extradition Treaty between the United States and Great Britain.

In 1980, I was one of a group of lawyers from the Brehon Law Society of New York who volunteered to represent one Desmond Mackin in his attempt to defeat a British request for his extradition to Northern Ireland. He was wanted on charges of a) attempted murder of a British Soldier, b) wounding the soldier with intent, and c) illegal possession of a firearm. These charges arose from an encounter between Mackin and four undercover British soldiers on a street in Belfast on March 16, 1978. Mackin and a friend, Robert Gamble, were both seriously wounded in the encounter. One British soldier received a gunshot wound in the buttock which the evidence tended to show was accidentally inflicted by one of his colleagues.

Mackin's arrest on an extradition warrant in New York on October 6, 1980, his applications for bail, the trial of the issues raised, the decision in his favor by Magistrate Naomi R. Buchwald in the Southern District of New York, the unsuccessful appeal from that decision and the denial of an application for Mandamus by the United States Government finally culminated in his deportation to his native Ireland on December 31, 1981, some fifteen months following his arrest. He spent that entire period in prison.

Mackin was initially charged with illegal entry into the United States before the Immigration and Naturalization Court in Brooklyn, New York. Following a preliminary hearing, he consented to an order of deportation. While he was in the act of leaving - he was literally on his way to J.F.K. International Airport - a provisional Extradition complaint was received from the British Government and based thereon, a warrant was issued by which he was arrested and held for Extradition.

His application for bail at that time was denied. Subsequent applications for bail, even after he had received favorable decisions at the District Court and Circuit Court levels, were also denied.

I think that it is important that this panel become familiar with the mechanics of pleading and proving a person's right to avoid extradition under the political offense exception.

It would appear from the Government's presentation that all one has to do is enter a plea of "Political Offense Exception" thereby automatically triggering some near impregnable defense which the Government has little or no capacity to overcome. Nothing could be further from the truth. Indeed, the opposite is the case.

From the moment of his arrest, a difficult and onerous task descends upon the extraditee. In three of the four cases (McMullen, Quinn, Mackin and Doherty) which seem to be the basis for the instant request for a change in the Treaty, the extraditees were foreigners far from family and home with very

meager resources at their disposal - depending entirely on the good will of friends and the voluntary help of the Irish-American community.

Frustrated in his desire to voluntarily depart from the United States - he was not a "terrorist" looking for a haven - Mackin thus began a fifteen month term in jail.

He was remanded to the Metropolitan Correctional Center in New York. A few friends sent him cigarette money but other than that he was without resources. He had no money to pay for a lawyer. The Brehon Society lawyers volunteered their services without fee.

Much research was required into the history of extradition law - they are not "everyday" cases. Motions were made for various forms of relief. All were denied.

Under the terms of the Treaty, the Government is required to prove that there is "probable cause" to believe that the extraditee did in fact commit the offense for which his extradition is sought. The requesting government meets this

burden by doing nothing more than filing duly executed and duly authenticated affidavits spelling out a "prima facie" case against the extraditee. These statements are taken at face value and are almost impossible to overcome. A denial of the allegations contained in those affidavits is inadmissible and indeed irrelevant. Contesting the attempted extradition does not give the extraditee the right to try his case in the United States court. All the judge or magistrate has to decide is: a) are there criminal charges pending against the extraditee in the requesting country; b) is the extraditee the person who is being sought and c) is there "probable cause" to believe he committed the offense charged, i.e., do the affidavits on their face make out a "prima facie" case.

In Mackin's case, the affidavits supporting the application were executed by "Soldier A", "Soldier B", "Soldier C" and "Soldier D". Mackin did not have the privilege of knowing who his accusers were.

Although the combined presentations of Soldiers "A", "B", "C" and "D" established that no gun was found either on Mackin or his friend Gamble even though they were shot down and arrested at the site of the encounter, the affidavit of one of the soldiers claiming he saw Mackin pull a gun from his pocket was sufficient to establish an element of "probable cause" that Mackin had possession of a weapon at the time and the magistrate so found.

Once "probable cause" is found, the burden of establishing a "prima facie" case with respect to each element of the political offense exception shifts to the extraditee and ultimately, the extraditee must prove by a preponderance of evidence that the crime for which he is sought is of a "political character".

In Mackin's case he now had to establish three elements.

The first was that Northern Ireland was "in a state of violent political disturbance such as war, revolution or rebellion". Expert witnesses had to be produced tracing the course of the present conflict. This included evidence of its intensity. A portion of this evidence showed Great Britain had derogated from the provisions of the European Convention on Human Rights (in 1957, 1969 and 1971) in the treatment of its own citizens in Northern Ireland, the reason given being that there existed in Northern Ireland "a public emergency threatening the life of the nation".

The second element of proof required the extraditee to establish to the Court's satisfaction that he was a participant in the political insurrection.

Finally, the extraditee had to prove that the acts charged were in furtherance of that insurrection. Mackin himself took the stand and was subjected to a long and severe cross-examination by one of the Government's top trial attorneys on these issues.

The Government too brought on its witnesses; a representative from the State Department, an arms expert from the F.B.I. laboratory; a lawyer from Northern Ireland and an officer of the Royal Ulster Constabulary. In all, over 1800 pages of testimony were taken during 9 days of actual trial. In addition, hearings, motions and applications required an additional 19 Court appearances - a total of 28 Court appearance. Lengthy briefs from both sides in support of the respective positions had to be prepared, served and filed and, finally on August 13, 1981, eleven months following his arrest, Mackin was found to be non-extraditable.

Magistrate Naomi R. Buckwald's 100 page opinion substantiating her finding that Mackin was entitled to the benefits of the "political offense exception" is considered by many experts to be the finest definitive treatise on that subject.

The case did not end there. The Government filed an appeal a) challenging the findings of the Court, b) sought a writ of mandamus directing that a finding of extraditability be made and an order so entered, and (c) challenging the jurisdiction of the Courts to pass upon the "political offense exception".

In the face of this, Mackin, having won his case, sought bail. Bail was denied him on August 14 by Magistrate Buckwald. It was denied again by U.S. District Judge Constance Motley on August 27, 1980.

An application for bail to the Second Circuit Court of Appeals on September 1, 1980 was also denied and on September 8, 1980 bail was denied by U.S. Supreme Court Justice Thurgood Marshall. Mackin, although he had won his case, sat in jail without bail, while his lawyers worked to counter the various and sundry maneuvers of the Government.

Ultimately he prevailed. The Second Circuit denied all the Government applications and rejected its Appeals. On December 31, 1980 Mackin was permitted to do what he had wanted to do all along - go home to his wife and family.

It was a long and arduous road. The issues were clearly defined and the burden upon the extraditee was heavy. There was nothing during the course of his fifteen month ordeal that suggested to him or to anyone else working on his behalf that America offered an open-door haven to "terrorists".

The Government has emphasized that one of the reasons the United Kingdom-United States Treaty has been selected for modification is that there is such a similarity between the judicial systems of both countries. Whatever the merits of a

parallel between our courts and those of mainland Britain - there is none whatever when it comes to Northern Ireland. The difference is as between day and night.

Since the creation of the State of Northern Ireland by an act of the British Parliament (The Government of Ireland Act of 1920), Northern Ireland has been governed by "emergency" legislation designed to control acts of violence arising out of political unrest. Its first such legislation - the Special Powers Act of 1922 - gave sweeping powers of search, seizure, detention, censorship and internment without trial.

The re-introduction of internment without trial on August 9, 1971 led to an upsurge of violence that made 1972 the bloodiest year in Northern Ireland since 1969. There were 10,000 shootings and over 1800 deaths between 1971 and 1978. There were almost 300,000 warrantless searches of homes occurring at the rate of 90 per day. Official British Government treatment of the

internees in 1971 led to charges brought against Great Britain by the Republic of Ireland in the Court of Human Rights in Strasbourg. The verdict in 1978 found Great Britain guilty of inflicting "inhuman and degrading treatment" of the detainees - its own citizens. Amnesty international also investigated and reported torture and ill treatment of detainees in that same period.

The Special Powers Act was so restrictive and repressive that in 1963 J.B. Vorsted, then Minister for Justice in South Africa, suggested to his parliament that its provisions should be adopted to help curb the agitation of Black Africans against apartheid. Although the Special Powers Act was repealed in 1973 many of its more odious provisions have found new life in the Emergency Provisions Act ("E.P.A.") (Northern Ireland) adopted in 1973 following the recommendations of a four-man

British Government Commission chaired by Lord Diplock, a British judge. The Act remains in effect to date. It applies to Northern Ireland only - not to the rest of Great Britain.

Lord Diplock's investigation of the situation in Northern Ireland included two visits by him only to Northern Ireland of two days each during which he consulted only with Government ministers and members of the Security Forces. This prompted Professor R.L. Turning of Warwick University to write:

"The picture thus presented of four outsiders sitting across the water consulting only with authority and propounding solutions for Ulster, is not likely to win the confidence of Republicans and Loyalists."

Acting upon the recommendation of the Diplock Commission, the British Parliament passed the Emergency Powers Act into law in 1973. The E.P.A. gives sweeping powers to the army, police and the courts. Among other things it permits

arrest and search without warrant of those suspected of "committing, having committed, or being about to commit" offenses covered by the E.P.A., and makes it illegal for those witnessing or having knowledge of terrorist incidents to refuse to cooperate with the authorities.

Persons suspected of being terrorists may be arrested without warrant and detained for up to seventy-two hours. This period has now been extended to seven days by the provisions of the Prevention of Terrorism Act ("P.T.A.").

Moreover, its extraordinary powers are not limited to scheduled offenses: British troops are permitted to arrest and detain temporarily without charge or warrant any individual suspected of any crime (reasonable suspicion is not required). The E.P.A. also creates new categories of crimes, such as the

wearing of hoods in public, and retains many features of earlier emergency laws. Its range and scope is wide-sweeping. Applying only to "terrorist" offenses, it provides for:

- trial by one judge sitting alone;
- admission to bail by order of a high court judge only - not a magistrate;
- arrest without warrant and detention by the Royal Ulster Constabulary for up to 72 hours (now extended to 7 days)
- wide powers of search and seizure by members of the security forces;
- reversal of the normal onus of proof in relation to offenses of possession of arms and explosives.

Acknowledging the severity of the measure at the time of its enactment, then Secretary of State William Whitelaw declared that "[t]he Bill contains some features unpalatable to a democratic society. Her Majesty's government does not disguise the fact that it imposes serious limitations on the traditional liberty of the subject." During the Parliamentary debate leading

up to the enactment of the E.P.A. into law, Sir Peter Rawlinson, then Attorney-General, referred to the provisions of the Act as "draconian measures".

In addition to creating broad powers of search and arrest, the Commission took care to provide guidelines for interrogation and the obtaining of statements from the suspect to be used by the prosecution. Lord Diplock's Commission recommended:

"It would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favors or indications of the consequences which might follow if the person questioned persisted in refusing to answer." (Emphasis ours)

Some other aspects of the judicial system sanctioned by the E.P.A. and currently in vogue in Northern Ireland are as follows:

Where the accused complains that his confession has been obtained by maltreatment, the burden is upon him to prove so by giving evidence first before the onus shifts to the prosecution to disprove the charge.

Evidence of paid informers ("supergrasses") standing alone without corroboration is sufficient to convict.

Prisoners are often held on remand for up to two years before going to trial; and in some instances the charges based upon "supergrass" evidence, are then withdrawn.

All statements obtained are admissible unless obtained by "torture, inhuman or degrading treatment."

Admission to bail although available is difficult to secure because of the role allowed to the Security Forces in giving "opinion" evidence before the court as to the activities of the accused.

Police are permitted to be present during the lawyer-client interview.

Lord Diplock's attitudes can better be understood by his comments on our legal system in the United States. Following his attendance at arguments on a case before the United States Circuit Court of Appeals (2nd Circuit sitting in New York), the judge remarked on September 22, 1980, "never mind the technicalities. Its a matter of gut feeling. We allow a verdict of guilty to stand if there is no substantial injustice."

It is difficult in light of the foregoing to discern any similarity between our system in this country and the system in Northern Ireland.

The country (Great Britain) which has sanctioned this caricature of a justice system into law now asks this august body to change our hallowed traditions by facilitating its efforts to apprehend those of its subjects who have revolted against the system which has so oppressed them. In its presentation to this body on August 1, 1985, the government spokesman, Judge Abraham Sofaer went to great lengths to convince this panel of the intentions of the State Department to be fair in the event that this treaty passes and gives to it the right to decide who shall and who shall not be extradited. The recent case of James Gerard Barr in the Eastern district of Pennsylvania gives us an idea of the State Departments sense of fair play in these matters.

Barr was arrested on an extradition warrant in Philadelphia last year. He was promptly lodged in jail without bail. The papers which accompanied the request for extradition and upon which the warrant of arrest was issued contained allegations purportedly establishing "probable cause" that Barr had committed a crime. The papers upon which the request for Extradition is based state that Barr was charged by the British Government with the attempted murder of Marine Kevin Lee Harris, a British soldier.

It is alleged that On July 14, 1981, at or about 7:10 p.m. a British military patrol was walking down the Falls Road in Belfast, Northern Ireland, when Marine Kevin Lee Harris was hit by bullets in the upper left arm and right thigh. The patrol consisted of five British soldiers, including Marine Harris. From the statements submitted, it appeared that the gunmen shooting at the patrol were firing from the corner of Sevastopol

Street and the Falls Road. Apparently none of the gunmen was hit. No other British soldier suffered any injuries. Marine Harris was treated at the Musgrave Park Hospital and was subsequently released in good condition. Military personnel and police who searched the area recovered spent bullets, but did not discover any of the gunmen.

Almost two years later on June 3, 1983 one Henry Kirkpatrick a "supergrass" or paid informer, pleaded guilty in a Belfast court to charges relating to the Harris shooting. Mr. Kirkpatrick gave a written statement of his and others' participation in the Harris shooting on August 18, 1983. A copy of that statement was included as an exhibit in support of the request for Barr's extradition, and constituted the sole evidence of any connection between the Harris shooting and Mr. Barr.

The relevant portion reads as follows;

"In the meantime Jim Barr from Twinbrook who was a volunteer in the Andersontown Unit arrived in his car which was a Renault 5 green color. I told him we were going to have a go at the Brits. I also told him to scout around the top end of Clonard Street for any other foot patrols."

On this statement, our State Department authorized the arrest of Barr and launched the Extradition proceeding.

The requesting papers contained not one other allegation against Barr. Nothing contained in it suggested that Barr even heard the alleged order let alone responded to it in any way. There is nothing to suggest that Barr went anywhere, did anything or said anything.

On their faces, the requesting papers were blatantly insufficient to establish a "prima facie" case and Judge Clarence C. Newcomer so found and denied the requested extradition.

Yet our Government never hesitated. It promptly responded to this glaringly insufficient request. Barr was arrested and kept in jail for almost a year. There is little doubt that without the intervention of an independent judiciary the Secretary of State would have signed the Extradition Order long ago.

I respectfully suggest that the waving of the "Anti-Terrorist" banner ought not to delude us into participation in such nefarious practices.

Respectfully submitted

BREHON LAW SOCIETY OF NEW YORK
October 22, 1985

PREPARED STATEMENT OF EUGENE E. J. MAIER

I am Eugene Edw. J. Maier and am here as President of the Brehon Law Society in Philadelphia, Pennsylvania.

The Brehon Law Society of Philadelphia is an association of Judges and Lawyers of Irish ancestry. Our membership includes members of the Bar of Philadelphia and the surrounding Pennsylvania counties.

I am here today to indicate our opposition to this proposed Treaty Amendment.

The Brehon Society believes the denial of human and legal rights to citizens of Ireland, south or north, is immoral and since these amendments extend this rights denial, we oppose it on those grounds.

When an armed conflict or rebellion exists in Northern Ireland as in many other areas of the world, such as Latin America, the attempt to amend this Treaty and selectively single out only those persons in Northern Ireland, while ignoring other areas of internal conflict clearly creates an immoral attempt to infringe the rights of Irish men and women and their descendants everywhere.

As we all know, to govern, a government must have the consent of those governed. It is very clear that a very large minority of the people who reside in Northern Ireland have refused their consent to Great Britain to rule that area. That lack of consent has been demonstrated in many ways over the last 800 years and recently has taken the form of armed confrontation between some of the citizens

in the north and the occupying forces of Great Britain. That armed confrontation forms the basis for another reason for our appearance in opposition here today.

I have just returned from a visit to Belfast and a tour of the Maze Prison, along with other Philadelphia Brehons.

Unhappily, I must report the indicia of armed rebellion abound.

As one drives through the main streets of Belfast, you will see landrover jeeps occupied by soldiers who have stopped people and are questioning them, sometimes searching them up against the wall. Citizens are required to give their name, address, age, place of destination, place of origin, and state their business.

Further along, you will see a prison wall, or a police station which has television cameras mounted for viewing the sidewalks every 30 or 40 feet.

Still further down the street, the driver points out a building that was bombed two weeks prior and then another building which is almost repaired which had been bombed six months ago. Another building in the next block, a courthouse, had been bombed within that week.

The driver points to another street down which only cars with special permits can travel, again to avoid bombing.

We saw a political party headquarters with boulders approximately three feet in diameter on the sidewalk and the entrance caged in with thick chained meshing to prevent cars and trucks from getting within five feet of the building, to reduce bombing risks.

One cannot ignore the separation fences that contain groups of citizens - in this case, the Catholics and the Protestants in their own ghettos. These separation fences, which entirely wall off

one area from another, appear to be 20 feet high and made of corrugated metal and thick wood planking. The fences cannot be breached visually or physically. Barriers have been imbedded in the streets to prevent rapid access or egress from one area to another, for military purposes.

British troupes of six to ten soldiers patrol the streets, moving from building to building with their backs flattened against the wall, looking up into windows as if searching for snipers and moving only when covered by another soldier. These same soldiers were close enough to my taxi so I could read the stock number on the war-ready automatic weapon gun butt, as he stared into the car at my camera, ready to prevent picture taking.

Police followed our group of three plainly marked taxies in unmarked vehicles, even though no impropriety was demonstrated by the group.

Even the Maze Prison which we toured, tacitly recognizes the armed conflict. In that prison, there are three groups of prisoners - the Republican cell blocks (the largest number), the Loyalist cell blocks (the second greatest), and the Mixed prisoners (having the lowest amount). Persons are placed in the Mixed cell blocks unless they request placement in either the Republican or Loyalist cell blocks. Their requested placements are accomplished. The prisoners, at least the Republicans, consider themselves as part of a military organization and respond to that discipline.

While the political designations are not officially recognized by prison authorities, de facto recognition results when prisoners are segregated in the manner described and the authorities know the recognized leaders by name, referring to him as the Leader.

We, of course, met with prisoners in each section during our tour.

The Longkesh Prison, which occupies the same grounds as the Maze Prison but has a different administration, currently houses only life prisoners, and that prison recognizes the actual para-military organizations and are organized strictly on basis of Republicans or Loyalists with each group having their own structure and leader.

These facts alone could certainly lead one to the conclusion that the first requisite of a political offense exception to extradition, i.e., a rebellion or an armed conflict, does in fact exist in Northern Ireland.

Since the existence of an armed uprising or rebellion is almost a certainty, obvious to even a casual visitor to Belfast, our next consideration is who can most fairly, honestly and justly determine whether an offense is a political offense or is an offense of a political character. Without doubt, the Brehon Society clearly asserts those decisions should be made in a duly constituted court of law, presided over by a judge who is free of political constraints.

Having served in the political arena as well as in an elected executive capacity in city government and now serving on the judiciary, and coupled with the knowledge gained from others who have had similar background but now serve on the judiciary, I suggest that personal experience may be instructive to determine where facts and law of political offense exemptions should be decided.

Immediately prior to assuming the bench in Philadelphia, I had the responsibility of supervising voter registration and elections in Philadelphia as an elected City Commissioner for more than 8-1/2 years. Very early in my service, I learned that no one who runs for election ever loses that election - they either win the election or someone cheats them out of winning. Unsuccessful

candidates are always looking for someone else to blame; usually the election officials, precinct election boards, city officials, and even the state officials are frequently castigated.

Even the best motivated and fairest minded individuals are suspect in election matters.

That same view translates generally to all who hold elected office who must be re-elected -- mayors, governors, legislators, council members, congress, members of Congress and the Senate are frequently accused, sometimes correctly, with being for or against some issue because that will help them politically. In fact we all realize that one of the basic concepts of elective politics is re-election.

With that in mind, is it not conceivable that a State Department employee or official who is charged with the responsibility of determining political offenses under a treaty to a friendly nation might consciously or sub-consciously consider that friendship or other political considerations when determining the rights of an individual in extradition matters.

Is it fair and just to even put that official in a position where political motivations may intrude. Certainly, it is not fair to the one asserting the political offense exemption to the extradition.

Is there a body of law the official would be required to follow as precedent? Or, would the official start developing a new body of law based on political, governmental, friendship, animosity, democratic or undemocratic reasons?

Even assuming this official decision maker was fair and just, would there not always be a potential appearance of impropriety?

Would the appearance of a possible political conflict occur in the mind of the public and the extraditee in the same way that an unsuccessful candidate never loses an election?

If I may be permitted an example -- in a recent case in the United States District Court for the Eastern District of Pennsylvania, the United States State Department, on behalf of the United Kingdom of Great Britain and Northern Ireland, sought to extradite James Barr to Northern Ireland by offering the affidavit of a confessed murderer, bank robber, informer named Kirkpatrick.

The affidavit indicates basically that the extraditee Barr was a volunteer of the Anderson Town Unit who arrived at a potential skirmish between Mr. Kirkpatrick's group and the British. On his arrival, Mr. Barr was told by Mr. Kirkpatrick to look around the area for other British troops. That is the end of Kirkpatrick's probable cause affidavit as it pertains to Mr. Barr. Nothing further connected defendant Barr in any way with any activity between Kirkpatrick's group and the other, nor was there any testimony that Mr. Barr did anything or agreed to do anything. Judge Newcomer ruled there was no probable cause and therefore, Mr. Barr could not be extradited.

I present this case not to debate probable cause, because none exists, but merely to highlight the previous point. Did someone in the State Department review this affidavit before court submission as currently required? Did the person who reviewed the affidavit believe probable cause was established by the affidavit? Did that person ignore the lack of probable cause? Did the State Department simply cave in to political pressure and submit the Barr case to the courts hoping extradition would occur without careful examination?

We, of course, are not here to question the State Department activities in the Barr case, I mention it only to point out that questions can be raised by reasonable persons as to the motivation of holding Mr. Barr and attempting to extradite him, when it is abundantly clear that probable cause could not be made out.

It is very clear to those in the Brehon Society that legal matters including extradition matters which determine political offense exception to extradition, should be properly left with the courts and the independent judiciary as heretofore.

Independent judges following established rules of evidence sitting in public courts where the extraditee can be represented by competent counsel and where all facts are placed openly on the record clearly, without question of prejudice or the possibility of extraneous matters being considered should be continued. An independent judiciary following legal persuasion and precedent, who is required to write an opinion which is open to appellate and its review are not only preferable but are mandatory if this country expects to continue to enjoy the world respect and reputation for being fair and just and to offering a haven to those in need as our forefathers were in the 1770s.

To change this Treaty now would reverse a tradition dating back to the 1840s and would indicate that we are no longer the haven for the oppressed and the political downtrodden. In addition, the Amendments and the retro-active portion of the Amendment would not only eliminate existing judicial decisions and case law, but would appear to violate the sacred tenets of Article I, Section 9 of the United States Constitution which prevents the adoption of ex post facto laws and Bills of Attainder.

While a judge, like any other human being, may err or be pressured or maybe even worse, the chances of this occurring are miniscule when compared with the potential for improper decisions or the appearance of impropriety when political offense extradition decisions are made by a political appointee. This becomes more relevant when you consider that a motion can be made to recuse a judge if potential conflict arise. That, of course, would not be the case with the State Department, even if the official making the decision was known to the extraditee.

This treaty appears to be an attempt to usurp the jurisdiction of the federal courts without legislation. It is an unwarranted and unscrupulous attack calculated to undermine the authority of courts and to gain a political objective which some apparently believe cannot be accomplished in fair impartial courtrooms where all sides are heard and matters are decided on the law.

For all of the foregoing reasons, the Brehon Society in Philadelphia asks this committee to reject the amendments to the Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and urges the Senate not to ratify these Amendments.

September 18, 1985

EUGENE EDW. J. MAIER, PRESIDENT

PREPARED STATEMENT OF KEARA O'DEMPSEY

I thank the Senate Committee on Foreign Relations for the opportunity to testify about the proposed supplementary extradition treaty. As the Committee has already seen, Irish-Americans of many political persuasions care deeply about the outcome of these hearings.

We necessarily approach the Senate and Committee with awe and respect. Great men have sat in the chairs you hold--Daniel Webster, Henry Clay, Robert Taft and Robert LaFollette. Today we come in great puzzlement as well, for many of the first men to hold your seats could have been extradited under the treaty you now consider: among them the first Senators from Virginia, Richard Henry Lee and James Monroe; first Senators from Rhode Island, New York, Georgia, and so on. In the first ten Congresses of the United States, a total of 56 senators would probably have been extraditable under a treaty such as this, for they "maliciously wounded and killed" British soldiers and possessed firearms with the intent "to endanger life." See Supplementary Treaty, Article 1 (g) and (j(1)). Some of their names and roles in the Revolutionary War are listed in Appendix A.

In fact very few major figures from the early days of our Republic could have avoided extradition under this treaty. Of those few famous men who would be safe under it, none comes readily to mind. Probably the best known of this latter small

group is Benedict Arnold who, in committing treason and the rankest betrayal, would have committed a "pure" political offense and thus remained immune from its provisions.

Such jarring results--so out of keeping with our traditions and national sensibilities--signal immediately that something is wrong with this treaty, deeply wrong with it. But even these rather macabre consequences are only a small part of this document's defects and failings.

In this statement I hope to take the implications of the supplementary treaty to their logical conclusion and thus suggest at least a few of the ills certain to result from its ratification. My arguments are organized under three headings:

- A. The treaty casts aside significant benefits which accrue to us through the political offense exception;
- B. It unnecessarily permits highly undesirable results, and otherwise fails to pass muster as responsible legislation; and
- C. It locks America into a "sweetheart" partnership with a regime whose existence depends on self-described "draconian" legislation, and renders America's courts a "long arm" of juryless Northern Irish courts in which senior judges have praised British Army soldiers for killing unarmed civilians.

- A. The Treaty Casts Aside Significant Benefits Which Accrue to Us Through The Political Offense Exception.

Nation-states have throughout history behaved notoriously badly toward their domestic political enemies and rebels. South Africa continues to imprison black leader Nelson Mandela, despite his age and illness. Great Britain executed all the leaders of the 1916 Uprising, just as her soldiers hanged the rebel Nathan

Hale. Benigno Aquino was murdered in the Phillippines upon his return from exile in America.

The political offense exception is the sole factor which would enable America to avoid becoming party to any of these reprehensible acts. It permits us to refrain from returning courageous men to face "victor's justice" at the hands of political courts and vindictive governments.

In the Mackin case--one of those attacked by the State Department through this treaty--the exception saved us from an equally ignoble act. Desmond Mackin, a native of Belfast, was unquestionably innocent of the offenses with which he was charged. The forensic evidence established that Mackin and his co-defendant were unarmed on the day he allegedly shot "Soldier A" in Belfast. Instead, it collaborated Mackin's testimony that he had been ambushed by a heavily armed patrol of British soldiers.

The injustice of extraditing Desmond Mackin is suggested by other facts of the day's events: the soldiers fired a minimum of 31 rounds at the two Nationalists, crippling the co-defendant for life. A soldier was superficially injured, apparently in the crossfire. When Mackin awoke in his hospital bed, he was charged by his political enemies with the crime.

The political offense exception has another highly significant benefit: it can force an unjust regime to come to terms with the genuinely political nature of its civil unrest. Great Britain's latter-day attempt to force the Northern Irish disturbances into the criminal category, and its refusal to come

to grips with their truly political nature, have come under severe criticism for years. See, e.g., Appendix B, pages 64B-65B, 76B. Yet there is hope: the Mackin finding of a "political offense" by an American court was cited by the prestigious London Sunday Times as a reason for a fundamental change in British policy toward Northern Ireland. See Appendix 1A(2), "Ireland: The Change That Has To Come," Sunday Times -ditorial, August 16, 1981, p. 12, col. 1.

In seeking to have such results set aside, the State Department and Great Britain engage in the age-old exercise of "killing the messenger." The American judicial holdings that these are "political offenses" are findings of which America should be proud and Britain respectful. To lay this messenger to rest is a disservice to both countries.

B. The Treaty Unnecessarily Permits Highly Undésirable Results And Otherwise Fails to Pass Muster as Responsible Legislation.

The treaty is a valuable lesson in the pitfalls of executive legislation, for it violates nearly every principle of good lawmaking. The Committee will, we trust, adopt Congressman Hughes' well-defended view that the superior approach is through congressional action rather than through the unpredictable and disorderly process of bilateral treaties. Nonetheless, some of the defects of the "treaty as legislation" are spelled out below.

Measured against the principle that legislation should always be drawn so as to permit the fewest undesirable results possible, the treaty is indefensible. Even the State Department admits

that the supplementary treaty would permit Great Britain to request the extradition of men who participated in the Easter Uprising of 1916 and Ireland's War for Independence; it would simultaneously force American courts to turn them over. Unquestionably the State Department had power to prevent such an absurd result. No excuse can possibly exist for its failure to do so.

In an ominously Orwellian fashion, the treaty declares that obviously political offenses "shall be regarded" as non-political. That the charges brought against defendants Doherty, Barr, Mackin and others are political cannot intelligently be questioned. They have been declared political by Britain's own statutes; by admissions of the British government; by our courts; and by responsible organizations of many descriptions. To say otherwise in the face of such overpowering evidence is a form of legislative "Newspeak." See, e.g., 64B, 77B-81B.

The Department states that the provisions of the treaty rest upon its findings that Great Britain and Northern Ireland are "open and democratic" countries. These "findings" have no evidentiary foundation whatever. The materials collected in Appendix B amply demonstrate that security of life, freedom of peaceful assembly and protest, freedom of travel and freedom from arbitrary search and arrest scarcely exist in Northern Ireland.

Moreover, the treaty bears the unpleasant scent of an ex post facto law and a bill of attainder. Deliberately the Department has drawn its terms so as to reach defendants who have already won their cases after full and fair hearings. See Article 4,

Supplementary Extradition Treaty. Such results are no less abhorrent in a treaty than in a statute, to persons committed to the rule of law and the principles embodied in our Constitution.

The treaty is discriminatory. It offends utterly the American belief that all persons should be treated alike no matter what their country of origin: an American extradition magistrate, after ratification of this treaty, will be forced to inquire as to the defendant's native country before knowing what law to apply to the case. As a group, Irish-Americans are deeply offended to think that, under it, the answer "Northern Ireland" will rob the defendant of a right available to citizens of every other country in the world.

The State Department has informed the Committee that this supplementary treaty does not stand in isolation. Yet it refuses to reveal anything about the remainder of its announced new "system" of extradition treaties. The Department's approach to the Committee appears to be in keeping with the old song, "We [You] don't know where we're going, but we're on our way."

- C. The Treaty Locks America Into A "Sweetheart" Partnership With A Regime Whose Very Existence Depends On Self-Described "Draconian" Legislation, And Renders America's Courts a "Long Arm" of Juryless Northern Irish Courts In Which Senior Judges Have Praised British Army Soldiers For Killing Unarmed Civilians.*

The Committee's learned and eminent witnesses have fully established that the supplementary treaty has many defects in addition to those cited above. This statement has not yet touched, however, on the most shameful aspect of the document: the approval it impliedly gives to a regime wholly unworthy of the name democracy.

We hope that the Committee will look much more deeply into Northern Ireland, for we are confident that it will find a far less "free and democratic" society there than the State Department claims.

* The materials set forth in Appendix B to this statement support both these statements. British Home Secretary Roy Mason admitted that the Prevention of Terrorism Act was "draconian" when he introduced it in 1974. The major provisions of the Act are still in effect. See Appendix B, page 33B and original report.

In 1984, Judge McDermott of the Northern Irish bench congratulated a British soldier for his "sharp shooting" in killing an unarmed Nationalist/Catholic. In the same year Lord Justice Gibson, a Diplock Court judge, praised three other soldiers for their "courage" in killing three Nationalist/Catholics who were also unarmed. See Appendix B, page 9B and 11B.

We have ourselves searched in vain for anything resembling either freedom or democracy for the Nationalist/Catholic minority of Northern Ireland. Certainly the origins of Northern Ireland were wholly undemocratic--it was created by arbitrary act of the British Parliament. The "vote" upon which the State Department instructs Nationalist/Catholics to rest their hopes, certainly availed them little then, for more than 80% of the Irish people had voted for both unity and freedom only four years before. See Farrell, M., The Orange State (London, 2nd ed. 1984).

Nor can one find any sign of freedom or democracy in the first five decades of Northern Ireland's existence--the British government permitted flagrant gerrymandering and discriminatory voting laws throughout that time. Under the Northern Ireland version of "democracy" a city with even a 66% Catholic majority continuously had a Unionist/Protestant mayor and city council. The result was the virtual disenfranchisement of the Catholic minority for better than fifty years. In response, Catholics in many localities ceased either voting or running for office. Ibid.

When finally Nationalists decided to seek a true voice in their own affairs, the British Government did not welcome them or encourage their participation. Rather, Catholic protest marchers and demonstrators were harrassed and pelted with rocks and cans. In 1972 the British Army effectively put an end to all peaceful protest by killing 13 unarmed demonstrators in Derry. See Appendix B, page 3B.

By 1972 Catholics were safe neither in the streets nor in their own homes. Armed Protestant gunmen rampaged through Catholic areas, setting fires to modest homes and abusing their inhabitants. The Northern Irish police and army responded in two ways: by standing idly by and by joining in the arson and physical abuse. See Appendix B, pages 4B, 6B; and Farrell, M., The Orange State, *supra*.

Two of the defendants whose cases are challenged by this treaty--Desmond Mackin and Joseph Doherty--were boys of 11 and 15 at that time. Both had lost their homes twice before they were 17, having been forced to watch helplessly as the gunmen abused their mothers and young sisters and set their houses on fire. One can imagine their feelings as the Northern Irish police stood silently and passively watching their homes go up in smoke.

The "vote" upon which the State Department places so much emphasis availed them nothing then and it would gain them nothing today, because they would still be members of a minority. We are amazed that the Department cannot see what all of America's minorities know so deeply: that a minority, by definition, cannot depend on the vote. A minority is uniquely dependent on constitutional protections such as a Bill of Rights and a fair, responsive court system. A minority depends, above all, on the good will and good faith of the government.

We have searched for evidence of these in Northern Ireland, and found none. Certainly Nationalist/Catholics enjoy none of the conditions which make human dignity possible. They live in a

statelet with no Bill of Rights and an utterly unresponsive court system. Their land is one in which the police and Army are apparently accountable to no one. At present the British Army and a largely Protestant police force can kill Northern Irish Catholics --even children--with virtual impunity (the acquittal rate for such killings approached 100% in early 1984). See Appendix B, pages 6B-7B, 17B, 28B, 29B.

Great Britain can in no way escape responsibility for the present situation in Northern Ireland. Knowing that Northern Ireland contained a severely disaffected minority, she nonetheless permitted the enactment of the Special Powers Act in 1922. This Act was so repressive and used so blatantly to repress Catholics that in 1936 Northern Ireland was compared to the then-existing Fascist regimes of Italy and Spain. Appendix B, pages 2B and 31B.

Moreover, Britain was warned as long ago as 1936 that the Catholic community had thus far remained non-violent but that young people were steadily being driven into the Republican (armed force) movement by the Unionist Government:

The fact that the Government's opponents have not been driven to adopt a policy of systematic violence, but rather to repudiate such a course, is one of the hopeful features in the present state of Northern Ireland. But at the same time there can be no doubt that large numbers of persons, particularly amongst the youth, who would normally owe allegiance to the constitutional Nationalist party, are being driven into the Republican movement.

See Appendix B, page 31B.

Great Britain Has Perpetuated and Exacerbated the Problem.

Since assuming direct responsibility for Northern Ireland in 1973, Great Britain has done little to correct these wrongs and much to perpetuate them. See Appendix B, *passim*, and especially pages 26B, 28B, 31B, 32B, 35B, 77B-81B.

The Westminster Government has remained unmoved by the plight of Nationalist/Catholics and appears even to have encouraged harassment of them. The soldiers responsible for killing young children remain unpunished. Some soldiers have been decorated for bravery and received congratulatory visits from Mrs. Thatcher and Prince Philip after "engagements" in which innocent Catholics were summarily gunned down. See Appendix B, page 12B.

The Role Assigned To The U.S. Under The Treaty

Through the State Department's new treaty, America's courts will serve as the "long arm" of the Northern Irish statelet. Our country will join hands, in law, with an entity which was created undemocratically and whose history of oppression rivals many dictatorships. The treaty forges a partnership with a state that unrepentantly continues to abuse its minority through "death squads," arbitrary arrests, warrantless searches of homes, Diplock courts, "supergrass" trials, "remand" (judicial internment for periods of up to two years), plastic bullets, torture of prisoners, refusal to prosecute the indefensible killings of innocent Catholics. See Appendix B, *passim*.

The Nationalist minority of Northern Ireland did not create these injustices and evil tactics. As we have seen, the Nationalist minority has had little voice, if any, in Northern Irish affairs throughout its tawdry history. Yet the State Department proposes that the United States join hands with the regime which has created--and which perpetuates--the fear and intimidation in which Nationalist/Catholics live.

We reject such a partnership and we request that the Committee do likewise. If the United States wishes finally to abandon its neutrality concerning Northern Ireland, there is one very constructive role that it may play. Far from granting Great Britain the tremendous and wholly undeserved privilege of renouncing our own precious traditions, the United States should pressure her to institute a regime which will allow Nationalist/Catholics to live in dignity and freedom, without constant fear of arrest, injury and death. If Great Britain refuses to do so, we should call on Great Britain to leave Northern Ireland pursuant to a responsible timetable.

In sum, this treaty should be rejected in keeping with the words of Mahatma Gandhi, another victim of British colonial behavior, who said:

Non-cooperation with evil is as much a duty as cooperation with good.

Post-Script: An American Lawyer's Personal Plea

My fellow lawyers and I have encountered a curious phenomenon over the last five years in our clients from Northern Ireland. Because of their experience with the Diplock courts, all enter even our American courts with the fixed idea that they will not receive a fair hearing. They firmly believe--one could hardly expect otherwise--that they will receive less than a fair hearing and be treated differently than extradition defendants from other countries.

Their relatives affirm the same belief. They have told us that when a young Nationalist/Catholic is arrested and charged in Northern Ireland, his family automatically assume that he will be away from them for the next 10 to 15 years.

Time and again we have persuaded the defendants and their families otherwise only through lengthy argument, often lasting intermittently over a period of weeks or months. After much labor we have succeeded in convincing them that in America they will be tried under the rule of law--fairly, impartially, under the same standard as defendants from other countries, with genuine heed paid to the facts.

This experience has given us an enormous pride in America and in American concepts of justice. We have been both proud and deeply moved to realize that America grants these men a gift the great gift of fairness for the first time in their lives.

The supplementary treaty destroys this gift. Under it, we will be forced to admit to future clients that here, as at home, they will be treated differently, in a manner deeply unfair to them. We will be forced to acknowledge that America, like Esau, did not stand the test but traded her inheritance for a "mess of pottage."

Our ability to persuade Catholics from Northern Ireland that in America they will receive "equal treatment under law" has been most precious to us. We ask you not to ratify this treaty, and thereby rob us and them, and our country, of that rare and wonderful gift.

PREPARED STATEMENT OF REPRESENTATIVE WILLIAM J. HUGHES

I AM GRATEFUL FOR THE OPPORTUNITY TO ADDRESS THE SENATE FOREIGN RELATIONS COMMITTEE CONCERNING THE PROPOSED SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND.

AS CHAIRMAN OF THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, WHICH WAS RESPONSIBLE FOR DRAFTING H.R. 3347, THE "EXTRADITION ACT OF 1984" INTRODUCED IN THE LAST CONGRESS, I WOULD LIKE TO REGISTER MY UNQUALIFIED OPPOSITION TO RATIFICATION OF THE SUPPLEMENTAL TREATY BEING CONSIDERED TODAY. THOUGH MY OPPOSITION GOES EQUALLY TO THE SUBSTANCE OF THIS SUPPLEMENTAL TREATY, TODAY I WOULD LIKE TO EMPHASIZE MY SEVERAL OBJECTIONS TO THE PROCEDURE BY WHICH THE ADMINISTRATION HAS UNDERTAKEN TO DRASTICALLY MODIFY OUR EXTRADITION LAW AND PRACTICE.

IN CASE THERE IS ANY MISUNDERSTANDING ABOUT THE FUNDAMENTAL NATURE OF THE INSTRUMENT NOW BEFORE THE SENATE, LET ME BEGIN BY POINTING OUT THAT THERE IS ALREADY IN FORCE AN EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM. THE PRINCIPLE EFFECT OF THIS SUPPLEMENTAL TREATY WOULD BE THE DEROGATION FROM OVER 100 YEARS OF AMERICAN EXTRADITION PRACTICE

AND CASE LAW BY VIRTUALLY DESTROYING THE SO-CALLED "POLITICAL OFFENSE EXCEPTION" TO EXTRADITION LAW. OF COURSE, THIS CATEGORICAL EXCLUSION OF VIOLENT CRIMES FROM THE SCOPE OF THE POLITICAL EXCLUSION WOULD, AS A RESULT OF THIS SUPPLEMENTAL TREATY, APPLY ONLY TO THE UNITED KINGDOM. HOWEVER, ASSISTANT ATTORNEY GENERAL STEPHEN TROTT RECENTLY DESCRIBED THE UNITED KINGDOM TREATY AS THE "KIND OF AGREEMENT THAT WE ARE GOING TO TRY TO PURSUE WITH EVERY ONE OF OUR FRIENDS AND ALLIES..." DAVID LANTHER, "U.S., BRITAIN SIGN NEW PACT ON FUGITIVES," NATIONAL LAW JOURNAL, JULY 29, 1985, 5. MOREOVER, THE LEGAL ADVISOR TO THE STATE DEPARTMENT READILY ADMITTED BEFORE THIS COMMITTEE IN AUGUST THAT THE UNITED KINGDOM IS AN "IDEAL NATION...FROM A MORAL AND POLITICAL POINT OF VIEW" TO BEGIN THE PROCESS OF EXEMPTING "STABLE DEMOCRACIES" WITH FAIR LEGAL SYSTEMS FROM THE RESTRICTIONS OF THE POLITICAL CRIMES DEFENSE. I STRONGLY OPPOSE THIS TREATY-BY-TREATY STRATEGEM WHICH, I BELIEVE, WOULD EFFECTIVELY PRE-EMPT THE LEGISLATIVE PROCESS. AS A RESULT, OUR EXTRADITION LAWS WOULD NOT BE CONSISTENTLY APPLIED BUT WOULD DEPEND UPON THE STATUS OF THE REQUESTING NATION AS A "FRIEND OR ALLY".

IT MAY BE INSTRUCTIVE TO REVIEW THE EVENTS SURROUNDING CONSIDERATION OF THE EXTRADITION ACT OF 1981. THEN, AS NOW, CONGRESS WAS CONSIDERING MODIFICATION OF THE POLITICAL OFFENSE EXCEPTION. THE INITIAL SENATE JUDICIARY BILL (S. 1639)

INTRODUCED IN NOVEMBER, 1981, GAVE THE SECRETARY OF STATE COMPLETE JURISDICTION OVER THE POLITICAL OFFENSE EXCEPTION. SHORTLY THEREAFTER, THE ADMINISTRATION SIGNED AN EXTRADITION TREATY WITH THE PHILIPPINES WHICH LIKEWISE PROPOSED TRANSFERRING DECISION-MAKING AUTHORITY ON THE POLITICAL OFFENSE QUESTION FROM THE COURTS TO THE STATE DEPARTMENT. THOUGH LESS RADICAL THAN THE UNITED KINGDOM EXTRADITION TREATY (WHICH DISALLOWS CONSIDERATIONS OF VIRTUALLY ALL VIOLENT CRIMES AS POLITICAL OFFENSES), THIS TREATY WOULD ALSO HAVE ESSENTIALLY DESTROYED THE JUDICIALLY DETERMINED POLITICAL CRIME DEFENSE. INTERESTINGLY, THE ADMINISTRATION DECIDED TO WITHHOLD FORMAL SUBMISSION TO THE SENATE, OUT OF DEFERENCE TO THE CONSIDERATION BY CONGRESS OF THE EXTRADITION ACT OF 1981. THE SENATE JUDICIARY COMMITTEE AMENDED THIS BILL TO INCLUDE A PROVISION WHICH ALLOWED FOR JUDICIAL REVIEW OF THE SECRETARY'S DECISION. THE SENATE FOREIGN RELATIONS COMMITTEE, FURTHER AMENDED THE BILL BY RETURNING JURISDICTION OF THE POLITICAL OFFENSE EXCEPTION TO THE COURTS. THIS COMMITTEE, THEREFORE REJECTED A CHANGE IN THE POLITICAL OFFENSE EXCEPTION MUCH LESS RADICAL THAN THE ONE WHICH THE ADMINISTRATION NOW ADVANCES. THE FINAL BILL, AS AMENDED BY THE COMMITTEE AND IMPROVED BY THE SENATE PROVIDED THAT VIOLENT CRIMES CAN SOMETIMES BE POLITICAL OFFENSES AND DENIED THE EXECUTIVE SOLE AUTHORITY TO MAKE THAT DETERMINATION.

THERE IS NO DOUBT THAT THE EXTRADITION LAWS ARE OUTDATED AND IN SORE NEED OF REFORM. HOWEVER, AS THE TESTIMONY MY SUBCOMMITTEE HAS HEARD OVER TWO CONGRESSES DEMONSTRATES, THE VERY COMPLEXITY OF THE ISSUES MITIGATES AGAINST EASY OR QUICK SOLUTIONS. INDEED, THE EXTRADITION ACT OF 1984 WAS THE PRODUCT OF EXTENSIVE CONSIDERATION, NUMEROUS HEARINGS AND A NUMBER OF HEATED MARK-UPS BY THE SUBCOMMITTEE ON CRIME AND THE FULL JUDICIARY COMMITTEE SPANNING A PERIOD OF NEARLY 5 YEARS. THAT EXTRADITION ACT OF 1984 INCLUDED A CODIFICATION OF CURRENT CASE LAW WITH RESPECT TO THE POLITICAL OFFENSE EXCEPTION WHICH HAD STRONG BIPARTISAN SUPPORT--IT WAS A CONTROVERSIAL AMENDMENT IN COMMITTEE, ON ANOTHER ISSUE ENTIRELY, THAT ULTIMATELY SPELLED THE DEFEAT OF THAT BILL.

OVER THE PAST SEVERAL YEARS, THE ADMINISTRATION HAS HAD AMPLE OPPORTUNITY TO ~~EN~~AGE IN DIALOGUE WITH APPROPRIATE CONGRESSIONAL COMMITTEES REGARDING THE REFORM OF EXTRADITION LAW. IT IS INVITED AND URGED TO CONTINUE THIS DIALOGUE. HOWEVER, I MUST FIRMLY RESTATE MY OPPOSITION TO THIS ATTEMPT TO DISREGARD THE WORK OF TWO CONGRESSES IN MODERNIZING--NOT REJECTING THE POLITICAL OFFENSE EXCEPTION.

I WOULD LIKE TO END MY REMARKS WITH SOME COMMENTS ON THE SUBSTANCE OF THE INSTRUMENT BEFORE YOU. I WILL NOT DWELL LONG ON THE LEGISLATIVE HISTORY OF THE "POLITICAL OFFENSE EXCEPTION"--SUFFICE IT TO SAY THAT, IN THE CONTEXT OF THE

HISTORY OF AMERICA AS A NATION OF IMMIGRANTS, CONCEIVED IN REVOLT AND AS A PEOPLE CONSEQUENTLY SYMPATHETIC TO STRUGGLES FOR SELF-DETERMINATION, THE RIGHT TO REFUSE EXTRADITION OF POLITICAL OFFENDERS HAS BECOME A HALLMARK OF OUR DEMOCRACY. THE "POLITICAL OFFENSE EXCEPTION" TO EXTRADITION FINDS ITS ORIGINS IN THE WRITINGS OF JEFFERSON, MARSHALL, WEBSTER AND MILL AND SHOULD NOT LIGHTLY BE DISCARDED.

I WHOLEHEARTEDLY SUPPORT THE ADMINISTRATION'S STATED GOAL OF IMPROVING LAW ENFORCEMENT AND COMBATTING TERRORISM. HOWEVER, CURRENT CASE LAW (AS WELL AS OUR CODIFICATION OF IT IN THE EXTRADITION ACT OF 1984) ALREADY REQUIRES THE EXTRADITION OF TERRORISTS, BY DENYING THE POLITICAL OFFENSE EXCLUSION TO CRIMES OF WANTON AND INDISCRIMINATE VIOLENCE COMMITTED WITH EXTREME INDIFFERENCE TO HARMING CIVILIANS.

FINALLY, I STRONGLY OBJECT TO THE ADMINISTRATION'S INTENTION TO SELECTIVELY DILUTE OR ELIMINATE THE APPLICATION OF THE POLITICAL OFFENSE EXCLUSION. THIS IS NEITHER ACCEPTABLE LEGAL PRACTICE, NOR WISE FOREIGN POLICY. UNIFORMITY AND EQUAL APPLICATION OF THE LAW ARE TIME-HONORED AND UNASSAILABLE GOALS IN THE DOMESTIC LEGAL SYSTEM OF A DEMOCRACY AND WE SHOULD LIKEWISE STRIVE TO EXTEND THEM TO THE INTERNATIONAL LEGAL ARENA. OUR OWN LAWS OF EXTRADITION SHOULD NOT BE DEPENDENT UPON THE POLITICAL CONFIGURATION OF THE REQUESTING COUNTRY. GOVERNMENTS WHICH ARE OUR "FRIENDS AND ALLIES" ONE

DAY CAN CHANGE VIRTUALLY OVERNIGHT INTO INTERNATIONAL FOES (WITNESS IRAN AND NICARAGUA). MOREOVER, CHANGES IN OUR OWN ADMINISTRATION WOULD ALSO AFFECT THE DEFINITION OF "FRIEND AND ALLY".

FURTHER, WE MUST NOT FORGET THE OTHER SIDE OF OUR APPLICATION OF DOUBLE STANDARDS, WHICH WOULD BE THAT AMERICANS, BOTH WITHIN OUR NATIONAL BOUNDARIES AND OUTSIDE THEM, WOULD BE SUBJECT TO DIFFERING LAWS DEPENDING UPON THE PARTICULAR TREATY THAT ENCOMPASSED THEIR ALLEGED ACTIONS. FOR EXAMPLE, THIS SUPPLEMENTAL TREATY WOULD ALLOW THE EXTRADITION OF AN AMERICAN CITIZEN CHARGED WITH CONSPIRING TO COMMIT ACTS OF VIOLENCE WITH REBEL FORCES IN NORTHERN IRELAND, EVEN THOUGH THE PERSON HAD NEVER LEFT THE COUNTRY. HOWEVER, AN AMERICAN WHO SIMILARLY CONSPIRED WITH REBELS FORCES IN SAY, AFGHANISTAN OR NICARAGUA, WOULD LIKELY NOT BE EXTRADITED SINCE HIS OR HER ACTIONS WOULD FALL WITHIN THE SCOPE OF THE POLITICAL CRIME DEFENSE, WHICH PRESUMABLY WOULD REMAIN INTACT WITH COUNTRIES NOT OUR "FRIEND OR ALLY". CONTRARY TO THE CLAIM OF THE ADMINISTRATION, SUCH SELECTIVE TREATIES WOULD MOST CERTAINLY HINDER OUR OWN CRIMINAL ENFORCEMENT BY ALLOWING THE EXTRADITION OF AMERICAN FUGITIVES TO DEPEND UPON THE PARTICULAR COUNTRY INTO WHICH THEY CHOSE TO FLEE.

FOREIGN RELATIONS AND THE INTERPRETATION OF INTERNATIONAL EXECUTIVE DISCRETION AND RESULTANT POLITICAL ORIENTATION; HOWEVER, WE SHOULD NOT CHANGE OUR LAWS AND OUR INTERNATIONAL AGREEMENTS

TO REFLECT THE EVER CHANGING ORIENTATION OF THE MOMENT. THIS IS WHAT THE SENATE IS BEING ASKED TO DO IF IT APPROVES THIS TREATY. THE BETTER APPROACH IS TO FINISH THE LAST FEW STEPS THAT MUST BE TAKEN TO COMPLETE THE LEGISLATIVE REVISION OF THE POLITICAL OFFENSE DEFENSE--ON A COMPREHENSIVE, NOT PIECEMEAL BASIS--WHICH LAW ARE REALISTICALLY, EVEN NECESSARILY, THE CREATURES OF WE BROUGHT NEAR COMPLETION WITH OUR WORK IN THE LAST TWO CONGRESSES. I PLAN TO COMPLETE THAT TASK IN THE HOUSE IN THIS CONGRESS, AND I URGE THAT YOU ALSO PURSUE THIS ROUTE TO MODERNIZE THE TREATMENT OF THE VEXING BUT ESSENTIAL POLITICAL OFFENSE EXCEPTION TO THE RULE OF EXTRADITION.

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Memorandum in Opposition to the Ratification of the Proposed
U.S.-U.K. Supplementary Extradition Treaty

by

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I. Introduction.

My name is Francis A. Boyle, Professor of Law at the University of Illinois College of Law in Champaign. I am writing to you today in opposition to the Senate giving its advice and consent to the ratification of the proposed U.S.-U.K. Supplementary Extradition Treaty. In my professional judgment, the ratification of this Treaty by the United States government would be inconsistent with its obligations under basic principles of international and domestic law, would illegally involve the United States in the conflict over the current status of Northern Ireland by choosing sides in favor of the position of the Thatcher government, and would ultimately prove to be counterproductive in terms of decreasing the amount of transnational violence committed by members of so-called national liberation movements against the innocent civilian population in Northern Ireland and other troubled areas of the world.

At the outset, I believe it would be advisable for me to say a few words about my academic and professional qualifications that underlie the opinion of law that will be set forth in this Memorandum. I received an A.B. in Political Science from the University of Chicago in 1971, where I was elected to Phi Beta Kappa as a junior and graduated in three years. From there I went to Harvard University, where I received a Juris Doctor Magna Cum Laude from the Harvard Law School in 1976, specializing in international law, and an A.M. (1978) and Ph.D. (1983) in Political Science from the Harvard Graduate School of Arts and Sciences, Department of Government, specializing in the relationship between international law and politics. I spent two years teaching international politics, law, organizations, and human rights in the Harvard College (1976-78); two

years as an Associate at Harvard's Center for International Affairs (1976-78); and one year practicing international law with a firm in Boston (1977-78). Since that time I have been successively Assistant Professor (1978-1981), Associate Professor with Tenure (1981-1984) and now full Professor (from 1984) at the University of Illinois College of Law in Champaign. During the past seven years here, I have taught in the fields of criminal law, international law, international organizations, international human rights, and jurisprudence, among others. I have written approximately thirteen major articles and one book generally dealing with the relationship between international law and politics, with a special emphasis on conflict resolution, the peaceful settlement of disputes, controlling international terrorism, promoting the laws of war and humanitarian armed conflict, and relating international law to the conduct of American foreign policy. I have served on several committees and panels organized by recognized professional societies that deal with these subjects, including under the auspices of the American Bar Association, the American Society of International Law, and the American Branch of the International Law Association. I have also lectured extensively in this country and abroad on these topics. All of my professional qualifications, publications and activities are fully described in the resumé attached to this Memorandum. Furthermore, I have not been paid, or received, or been promised any form of compensation, remuneration, or benefit by any individual, corporation, group or movement for the composition of this Memorandum.

II. There Is No Generally Accepted Definition for the Word "Terrorism."

Upon its ascent to power in January of 1981 the Reagan administration forthrightly proclaimed its intention to replace President Carter's emphasis on "human rights" with a "war" against "international terrorism" as the keystone of its foreign policy. In my professional opinion, this reordering of priorities for the future conduct of American foreign policy was seriously misdirected. "Terrorism" is a vacuous and amorphous concept entirely devoid of an accepted international legal meaning, let alone an objective political referent. The standard cliché that one man's "terrorist" is another man's "freedom fighter" is not just a clever obfuscation of values. It indicates that the international community has yet to agree upon a legal or political definition for the term "terrorism." For example, the U.N. Ad Hoc Committee on International Terrorism could not even agree on a definition for the word "terrorism." See Report of the Ad Hoc Committee on International Terrorism, 34 U.N. GAOR Supp. (No. 37) at 1, 11, para. 34, U.N. Doc. A/34/37 (1979). Yet due to the transnational character of "terrorism," the establishment of multinational consensus and cooperation is the only way wanton violence against innocent civilians can be adequately combatted.

This pejorative and highly inflammatory term has been used by the governments of the United States, Great Britain, the Soviet Union, Nicaragua, Israel, and South Africa, among others, to characterize acts ranging the spectrum of violence from common crimes to so-called wars of national liberation. Invoking a holy war against "international terrorism" may constitute effective governmental propaganda to manipulate public opinion in support of a foreign policy premised on considerations

such as Machiavellian power politics. But it cannot serve as the basis for conducting a coherent and consistent global foreign policy in a manner that protects and advances America's legitimate national security interests in accordance with the requirements of international law. In this regard, the surreptitious and expeditious manner in which the Reagan administration attempted to move this proposed Treaty through the Senate Foreign Relations Committee immediately before your summer recess without public debate, scrutiny or even awareness indicates to me that political accommodations with the Thatcher government were perhaps the primary reason for its negotiation and conclusion.

Despite my serious reservations about the analytical utility of employing the term "terrorism" and its numerous derivatives, I will nevertheless do so even though I believe that term obscures more than it clarifies. For analytical purposes, I would prefer to talk about "transnational violence perpetrated by non-state actors against the civilian population." Nevertheless, for want of a better term, I will use the words "terrorism" and "terrorists," but only because they have entered into popular acceptance, and always subject to the above qualifications.

III. The Reagan Administration's "War Against International Terrorism" Subverts Due Process of Law.

To begin with a preliminary observation, as a Professor of Criminal Law for the past seven years, this author submits that it makes little practical sense to treat a member of a so-called national liberation movement who has allegedly committed an act of "international terrorism" as if he were a common criminal. A politically motivated member of a

so-called national liberation movement possesses an internal normative value structure which is just as (if not more) clearly defined and highly refined as that of the ordinary citizen, let alone that of the common criminal. After all, ordinarily neither one of the latter two types is routinely prepared to die for what he believes in.

For this reason, the treatment of a self-styled national liberation fighter as a common criminal would not serve the traditionally recognized purposes for the various systems of criminal justice administration prevalent in most states of today's world, and especially in the United States of America. In the professional literature, these objectives are typically said to be retribution, general or specific deterrence, reformation, and rehabilitation. To attempt to include self-styled national liberation fighters within the reach of the ordinary criminal law simply distorts the fiber and ultimately weakens the integrity of the criminal justice system itself.

As demonstrated by the situation in Northern Ireland today, the prolongation of this process will inevitably destroy the set of procedural protections created by any adequate system of criminal justice administration pursuant to the basic requirement of "due process of law." This will in turn redound to the severe detriment of the civil rights and civil liberties of the entire citizenry. Treating self-styled national liberation fighters as common criminals only subverts the rule of law in the domestic political order and thus eventually undermines the democratic forms of constitutional government that are so vitally dependent upon it.

In this regard, I was somewhat surprised that a former jurist possessing such impeccable credentials as Abraham Sofaer appeared before this Committee on August 1, 1985 in an inexplicable attempt to defend the

existence of due process of law in Northern Ireland despite the manifest weight of the evidence to the contrary. In his desire to secure this Committee's approval of the proposed Treaty, Judge Sofaer necessarily had to defend the indefensible by distorting the meaning and purpose of "due process of law" as it has been handed down to us from our Founding Fathers. His testimony on this point was merely symptomatic of the Reagan administration's overall tendency to further infringe upon well-established civil rights and civil liberties in this country in the name of its self-proclaimed war against international terrorism.

IV. The Laws of War Should Be Applied³ to International Terrorists.

A better approach to the problem of "fighting the war against international terrorism" would be to take self-styled national liberation fighters at their collective word, and therefore to treat them as combatants subject to the laws and customs of war and to the international laws of humanitarian armed conflict. In other words, they would be held to the high standards of belligerent conduct that are applicable to soldiers fighting in an international armed conflict. Hence, when a self-styled national liberation fighter is captured after attacking a legitimate military target, he would not be punished, but instead treated analogously to a prisoner of war. On the other hand, when a self-styled national liberation fighter is captured after attacking innocent civilians, he would be prosecuted for the commission of war crimes under principles of international, not domestic, criminal law. If found guilty, he would be punished as a war criminal, not a common criminal.

Under generally recognized rules of international law, the status of "war criminal" warrants the imposition of extremely severe penalties upon the perpetrator, up to and including death. Furthermore, it is another black-letter rule of international law that there exists what is called "universality" of jurisdiction for any state member of the international community to prosecute a war criminal without limitation of time and without a protection against double-jeopardy. According such harsh treatment to self-styled national liberation fighters who have violated the international laws of humanitarian armed conflict would bring home to themselves, their movements and the world at large the unique nature of the gravity and heinousness of their crimes.

Moreover, to hold members of so-called national liberation movements to the high standards of international behavior applicable to soldiers would provide their respective organizations such as the IRA with an enormous political incentive to concentrate their violent attacks exclusively upon legitimate military targets capable of defending themselves, much to the benefit of the innocent civilian population. Conversely, obstinate insistence by the concerned governments to treat members of so-called national liberation movements as common criminals creates absolutely no incentive for these organizations to distinguish attacks upon the civilian population from those upon military targets, precisely because their fighters will be punished as common criminals no matter whom or what they attack. For the purpose of promoting respect for the fundamental human rights of their own citizenry, it makes far more sense for concerned governments to treat self-styled national liberation fighters analogously to soldiers than to common criminals. To the extent that concerned governments refuse to do so for political reasons or

propaganda purposes, they must assume a considerable amount of direct responsibility for the horrible violence that is inflicted upon their civilian populations by so-called national liberation movements. And just because the Thatcher government has most obtusely continued to deal with the tragic situation in Northern Ireland in this ultimately self-defeating and callously inhumane manner provides absolutely no good reason or justification for the United States government to become a party to the conflict and further compound the tragedy by ratifying the proposed Supplementary Extradition Treaty.

V. Additional Protocol One (1977) to the Four Geneva Conventions of 1949
Solves the Problem.

Moreover, I am not alone in this professional judgment that members of so-called national liberation movements should be held to the high standards of international belligerent conduct that are imposed upon soldiers. In this regard, I refer you to a prestigious report of the distinguished Committee on Armed Conflict of the American Branch of the International Law Association, which adopts a line of analysis similar to the one presented above. See American Branch, International Law Association, Report of the Committee on Armed Conflict, 1979-1980 Proceedings and Committee Reports 38. Indeed, this particular approach to the problem of combatting transnational violence perpetrated by members of so-called national liberation movements against innocent civilians has been generally accepted by the international community in Additional Protocol One of 1977 to the Four Geneva Conventions of 1949. As of June

30, 1985, 62 states have signed Protocol One, and it has been ratified by 19 states and acceded to by 32.

Although not absolutely perfect in all respects, the rules set forth in Protocol One represent the best consensus of international opinion possibly attainable on how the world community should deal with acts of violence committed by members of so-called national liberation movements against civilians. Bilateral arrangements motivated primarily by political considerations such as the proposed U.S.-U.K. Supplementary Extradition Treaty will only impede this process. In my professional judgment, the strongest contribution the Reagan administration could possibly make to fighting the so-called war against international terrorism would be to recommend that the Senate give its advice and consent to Protocol One, not this Supplementary Extradition Treaty.

Now the United States government has signed but not yet ratified Additional Protocol One. According to the basic rule of customary international law enunciated in article 18 of the 1969 Vienna Convention on the Law of Treaties, the United States government is under an obligation to refrain from acts which would defeat the object and purpose of Protocol One until it has made clear whether or not it intends to ratify the Protocol. Since this latter event has not yet occurred, for the time being the U.S. government is obliged to act in a manner not inconsistent with the terms of Protocol One, and in any event it must scrupulously observe the Four Geneva Conventions of 1949. Furthermore, in the most unfortunate event that the President should someday decide not to support the ratification of Additional Protocol One, I would nevertheless argue that its terms still represent the best consensus of international

opinion for dealing with the problem of transnational violence perpetrated by non-state actors against innocent civilians.

According to the definition found in article 1, paragraph 4 of Geneva Protocol One, the IRA claims it is "fighting against colonial domination and alien occupation" and "against a racist regime" in Northern Ireland in the exercise of the Irish peoples' right of self-determination. However, the determination of whether or not this claim is in fact true or false would be immaterial to the application of Additional Protocol One and the Four Geneva Conventions of 1949 to the conflict in Northern Ireland. According to article 7 of Protocol One, the application of the Four Geneva Conventions and the Protocol by the U.S. government or any other state will not affect the legal status of the parties to the conflict, nor the legal status of the territory in question--in this instance, the IRA and Northern Ireland, respectively. In other words, the U.S. government could safely apply Protocol One simply as a humanitarian measure designed to better protect the innocent civilian population of Northern Ireland without taking any position on who is right or wrong in the conflict. By contrast, ratification of the proposed U.S.-U.K. Supplementary Extradition Treaty will clearly align the U.S. government with the questionable position of the Thatcher government that the IRA is nothing better than a gang of common criminals and that the situation in Northern Ireland is purely a matter of domestic, not international, concern.

Once it has been determined that Additional Protocol One applies to the conflict in Northern Ireland, the IRA would be subjected to the full panoply of rules for the humanitarian conduct of warfare set forth in the Four Geneva Conventions of 1949 and Protocol One. Under the Third Geneva Convention of 1949 and Additional Protocol One, the United States

government would have an affirmative obligation either to prosecute or to extradite an IRA member alleged to have committed "grave breaches" of the Geneva Conventions and Protocol. In other words, the obligation to prosecute or extradite would apply to those IRA members who have allegedly committed serious violations of the laws and customs of warfare by perpetrating indiscriminate attacks upon the civilian population. On the other hand, there would be no obligation for the United States government to prosecute or extradite an IRA member for attacks upon legitimate military targets. For the sake of convenience, I will analyze the legal consequences of the latter case first.

VI. IRA Members Who Have Not Violated the Laws of War Are Entitled to Political Asylum in the United States.

Those IRA members seeking refuge in the United States who had conducted military operations against soldiers, convoys, barracks, policemen, or other legitimate military targets have committed no violations of the laws and customs of warfare. Thus, such non-offending IRA members could neither be tried by the United States government nor extradited to Great Britain without violating U.S. obligations under the Third Geneva Convention and Additional Protocol I. Furthermore, under the 1967 Protocol to the U.N. Convention Relating to the Status of Refugees and the U.S. Refugees Act of 1980, such non-offending individuals would be entitled to apply for political asylum here in the United States.

The 1951 U.N. Convention Relating to the Status of Refugees and its 1967 Protocol, to which the United States is a party, define a "refugee" as: "any person who owing to well-founded fear of being persecuted for

reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it." Congress enacted the Refugees Act of 1980 for the express purpose of bringing United States immigration law up to the higher standards enunciated in the U.N. Protocol. The Refugees Act created a statutory definition of "refugee" which corresponds in substance to the definition found in the U.N. Protocol.

One who qualifies as a "refugee" within the meaning of that definition is entitled to apply to the government of the country where he is present for asylum. According to the Refugees Act of 1980, an alien physically present in the United States or at a land border or port of entry may apply for asylum, irrespective of such alien's status, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of the Act. This right to apply for asylum applies even to those aliens illegally present in the United States so long as they qualify as refugees.

In addition to applying for asylum, in the event the Immigration and Naturalization Service apprehends an illegal alien such as a fugitive IRA member, he is also entitled to apply for a form of discretionary relief known as Withholding of Deportation. The U.N. Refugees Convention and Protocol codified the basic right of customary international law known by its French name as "non-refoulement." The U.N. Refugees Convention

article 33, section 1, states unequivocally: "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Refugees Act of 1980 amended U.S. immigration law to bring it into conformity with this requirement. The Attorney General cannot deport or return any alien to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. The Attorney General must withhold deportation of that alien even if he is in this country illegally.

For the United States government to ratify the proposed U.S.-U.K. Supplementary Extradition Treaty would clearly be inconsistent with outstanding U.S. obligations under the 1967 U.N. Refugees Protocol and Congress's own 1980 Refugees Act. This is because the Treaty's denial of the traditional "political offense" exception to IRA members who have not committed a violation of the laws and customs of war would result in their extradition to the United Kingdom despite the fact that such non-offending individuals are clearly entitled to political asylum in the United States. Furthermore, even if political asylum is either properly or improperly denied by the Attorney General, at an absolute minimum, pursuant to the separate and independent international legal right of non-refoulement, these non-offending IRA members must not be returned to a country such as the United Kingdom where both their lives and freedoms would clearly be threatened on account of their race, religion, nationality, membership of a particular social group, and political opinion. Moreover, there is absolutely no way the proposed U.S.-U.K.

Supplementary Extradition Treaty can be reconciled with these current requirements of both international and U.S. domestic law by means of the Senate attaching reservations, amendments, or understandings to its advice and consent. Therefore, it is respectfully submitted that this Committee should recommend against the ratification of the proposed Treaty in toto.

VII. IRA Members Who Have Violated the Laws of War Should Be Prosecuted for War Crimes by Congress Enacting the Required Implementing Legislation under the Geneva Conventions and Protocol.

A totally different case would arise with respect to those IRA members apprehended in the United States who have allegedly violated the laws and customs of warfare by engaging in indiscriminate attacks upon the civilian population in Northern Ireland or Great Britain. Under the Third Geneva Convention of 1949 and Additional Protocol One, the United States government would be obligated either to extradite or to prosecute those alleged to have committed grave breaches of the Geneva Conventions and Protocol. Most regretfully, the United States Congress has never enacted the implementing legislation required by the Four Geneva Conventions of 1949. Therefore, it would be constitutionally impermissible for the United States government to prosecute an IRA member found within its territorial jurisdiction who might have allegedly committed violations of the laws and customs of warfare in Northern Ireland or Great Britain.

Hence Judge Sofaer was correct to have testified that under the current state of federal law, U.S. courts would not have jurisdiction to try such offenses. But the proper solution to this problem is for Congress to enact the implementing legislation already required by the

Four Geneva Conventions of 1949 in order to provide for the prosecution of those alleged to have committed "grave breaches" of the laws of humanitarian armed conflict as defined therein. By contrast, it would be a thoroughly misguided and completely inadequate approach for the U.S. government to try to rectify this jurisdictional lacuna by ratifying the fatally defective proposed U.S.-U.K. Supplementary Extradition Treaty. Even the latter event would still not fulfill outstanding U.S. commitments to pass the required implementing legislation under the Geneva Conventions, and would be subject to all the problems of bias and unfairness mentioned above. But if both Houses of Congress were to pass implementing legislation for the Geneva Conventions and Protocol, U.S. courts would then have all the jurisdiction they need under both international law and U.S. domestic law to prosecute members of so-called national liberation movements such as the IRA or PLO etc. who might perpetrate acts of violence upon innocent civilians anywhere in the world.

VIII. The So-Called IRA Extradition Cases Were Correctly Decided.

In light of the above discussion, the Reagan administration's claim that there is something wrong with the way the political offense exception to the current U.S.-U.K. Extradition Treaty has been applied by U.S. courts is simply not true. For the most part, the federal magistrates or judges hearing requests by the United Kingdom for the extradition of IRA members have generally applied the framework of analysis developed above for distinguishing between the legal consequences of attacks upon legitimate military targets from those of attacks upon innocent civilians by members of so-called national liberation movements. When the requested

fugitive has been alleged to have committed an offense that is not a violation of the laws and customs of war, the political offense exception has been quite appropriately applied and extradition has been denied. See, for example, the McMullen, Mackin, and Doherty cases. The fact that an innocent civilian might have been killed or injured incident to such an attack upon a legitimate military target is tragic and regrettable, but it does not constitute a violation of the laws and customs of warfare. On the other hand, when the requested fugitive is alleged to have committed a serious violation of the laws and customs of warfare by perpetrating an indiscriminate attack upon the innocent civilian population, the political offense exception has been denied and extradition has been granted. See, for example, the Quinn case and Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

From this perspective it is clear that the political offense exception to the current U.S.-U.K. Extradition Treaty is working precisely in the way that it should work, and therefore that there is no need to amend the current Treaty in light of the non-existence of any problem under its operation. Apparently the Thatcher government does not agree with the good faith interpretations of international and domestic law applied by U.S. courts to the current Extradition Treaty. Once again, however, the correct solution to this problem is not to require our courts to ignore the requirements of both international and domestic law by ratifying this Supplementary Extradition Treaty, but rather for the Thatcher government to bring its policy in Northern Ireland into concordance with the rules of international law.

Until that time, the situation in Northern Ireland will remain an ongoing transnational conflict, and the basic rule of relevant

international law is that of non-intervention for third parties. The United States government is obligated to refrain from choosing sides in this conflict in favor of the position of the Thatcher government. Yet by ratifying this Supplementary Extradition Treaty, we will have abandoned all pretense of neutrality and in essence have ratified the questionable Thatcher premise that the IRA is nothing but a gang of common criminals and that the conflict in Northern Ireland is purely a matter of domestic concern for law enforcement authorities alone. In my opinion, and that of most informed observers, nothing could be further from the truth.

IX. This Treaty Will Operate Like an Unconstitutional Bill of Attainder.

Let me conclude with the following observation in regard to the proposed retroactive effect of this Supplementary Extradition Treaty as found in article 4. In light of Judge Sofaer's testimony and of numerous public statements made by responsible members of the Reagan administration, it is difficult not to conclude that the ratification of this Treaty is specifically intended by the United States government to lead toward the extradition and eventual prosecution and punishment of Mr. Doherty despite the correct decision by Judge Sprizzo that he is entitled to the political offense exception found in the current U.S.-U.K. Extradition Treaty. In my opinion, therefore, the ratification of this Supplementary Extradition Treaty would constitute the functional equivalent of a Bill of Attainder that is specifically prohibited to Congress by Article 9, Section 9, Clause 3 of the Federal Constitution. Indeed, if this proposed Treaty were to be ratified and the United Kingdom were to seek Doherty's extradition thereunder, I would envision a very

serious attack upon its constitutionality as applied to Doherty along these lines. It is another black-letter rule of United States law that all United States treaties must be consistent with the terms of the United States Constitution. I would not hazard a guess whether a federal court would hold that this Treaty has operated in a manner analogous to a prohibited Bill of Attainder and therefore is unconstitutional with respect to Mr. Doherty. But I do ask the question, in light of the testimony given by Judge Sofaer before this Committee on August 1, why would the Senate even want to give its advice and consent to a Treaty which the executive branch of government clearly intends to operate as if it were an unconstitutional Bill of Attainder with respect to Mr. Doherty?

In the most unfortunate event that this Committee should recommend that the full Senate give its advice and consent to the proposed U.S.-U.K. Supplementary Extradition Treaty, I would respectfully submit that you recommend the full Senate to amend article 4 along the lines of the note of 8 June 1972 transmitted by the Honorable R. V. Richardson on behalf of the Secretary of State of the United Kingdom to the Honorable Walter H. Annenberg, U.S. Ambassador to the United Kingdom, in conjunction with the signing of the current U.S.-U.K. Extradition Treaty of that date:

It is the understanding of the Government of the United Kingdom that, without prior concurrence by both Governments, no application will be made for the extradition of a person for an offence committed before the Treaty signed today enters into force if extradition of such person for that offence, or any other offence, has previously been denied because the offence was not included in the Extradition Treaty between the United Kingdom and the United States, signed at London on 22 December, 1931.

If such a restriction was thought both necessary by the United States government and acceptable to the government of the United Kingdom in 1972, I cannot understand any good reason that should be responsible for the dramatic change in that policy as found in the 1985 Treaty.

Therefore, article 4 of this Supplementary Extradition Treaty should be amended to the effect that it would not apply to an application for the extradition of a person for an offense committed before the Supplementary Treaty enters into force if extradition of such person for that offense, or any other offense, has previously been denied because the offense was not included in the 8 June 1972 Extradition Treaty between the United Kingdom and the United States. At the very least, such an amendment would eliminate the unconstitutional Bill of Attainder effect the ratification of this proposed Supplementary Extradition Treaty would unquestionably have upon Mr. Doherty. As mentioned above, however, in my professional opinion there is no way the Senate could adequately amend this proposed Treaty in order to remove its most objectionable features under both international and domestic law.

X. Conclusion.

In summation, then, my conclusions are threefold:

First, the Senate Committee on Foreign Relations should recommend against the full Senate giving its advice and consent to the ratification of the proposed U.S.-U.K. Supplementary Extradition Treaty.

Second, the President should recommend that the Senate give its advice and consent to the ratification of Additional Protocol One to the Four Geneva Conventions of 1949.

Third, both Houses of Congress should pass the required implementing legislation necessary to bring the Four Geneva Conventions of 1949 and Additional Protocol One into effect as domestic law.

-21-

The ratification of Additional Protocol One and the passage of the required implementing legislation under the Geneva Conventions and Protocol would provide the necessary legal framework for the United States government to deal with the problem of transnational violence committed by members of so-called national liberation organizations against the innocent civilian population in Northern Ireland and elsewhere in the world. By contrast, the ratification of the proposed U.S.-U.K. Supplementary Extradition Treaty would simply constitute a retrograde step that would impede the development of an international consensus along these lines, and, even worse, that would illegally intervene into the conflict over Northern Ireland on the side of the Thatcher government.

Quite obviously, in the short amount of time that has been allotted to me by the Reagan administration since my recent receipt of Judge Sofaer's August 1 testimony and the text of the proposed Treaty, I could not possibly consider all the various objections that have been raised to it by the members of this Committee during the course of your examination of Judge Sofaer. However, I will be happy to appear before the Committee at your convenience to further discuss the matters which I have set forth in this Memorandum and to answer any additional questions you might have about the proposed Treaty. Thank you very much for your kind attention and consideration. It has been most appreciated.

Respectfully submitted,

Francis A. Boyle

Francis A. Boyle
Professor of Law

RESUME OF FRANCIS A. BOYLE

EDUCATION

University of Chicago, A.B. (1971) in Political Science. Elected to Phi Beta Kappa as Junior; winner as Junior of Sigma Xi Certificate of Merit and Prize in theoretical biology for The Differential Effects of Three Simulated Systems of Inbreeding on the Frequency of the t(w) Allele in Wild Populations of Mus Musculus on nomination of Richard C. Lewontin; graduated in three years; 3.9 average.

Harvard Law School, J.D. Magna Cum Laude (1976). Third year paper designated "Honor Paper" by Richard R. Baxter, and deposited in H.L.S. Library. A's in Tax (Surrey), Soviet Economic Law (Berman), U.N. Law (Sohn), Jurisprudence (Unger) and Sociology of Law (Fuller).

Harvard Graduate School of Arts and Sciences, A.M. (1978), Ph.D. (1983) in Political Science. Awarded Harvard Fellowship for all four years of residence. Offered Russian History (Keenan), Soviet Politics (Ulam), Political Philosophy (Walzer) and International Relations (Hoffmann) on Ph.D. General Examination. Dissertation: Realism, Positivism, Functionalism and International Law.

Associate and Executive Committee Member, Harvard Center for International Affairs (1976-78).

EMPLOYMENT

Teaching Fellow, Harvard University Department of Government (1976-78) (Subjects: International Politics, Law, Organizations, and Human Rights).

Attorney with Bingham, Dana, & Gould, Boston (1977-78), primarily in tax and international tax. Wrote winning brief in Hart v. United States, 585 F.2d 1025 (Ct. Cl. 1978) (en banc) (statute of limitations for foreign tax credit election 10 years instead of 3). Member of the Massachusetts Bar.

Assistant Professor (1978-81), Associate Professor with tenure (1981-84), full Professor (from 1984), University of Illinois College of Law at Champaign (Subjects: International Law, Organizations, Transactions, Human Rights; World Order; World Politics and International Law; Criminal Law; Jurisprudence). Executive Committee, U.I. Program in Arms Control, Disarmament and International Security (from 1979); Associate, U.I. Center for Latin American Studies (from 1984).

PUBLICATIONS

World Politics and International Law (Duke University Press: 1985).

The Irrelevance of International Law, 10 Cal. West. Int'l L.J. 193 (1980).

International Law in Time of Crisis, 75 Nw. U.L. Rev. 769 (1980), republished in 2 Nat'l L. Rev. Rep. 537 (1981).

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The Entebbe Hostages Crisis, 29 *Nether. Int'l L. Rev.* 32 (1982); and in 22 *Indian J. Int'l L.* 199 (1982); and in Terrorism, Political Violence and World Order 559 (H. Han ed. 1984).

International Law as a Basis for Conducting American Foreign Policy, 8 *Yale J. World Pub. Ord.* 103 (1981), republished as U.S. Department of Defense, *Current News: Special Edition*, No. 979 (Mar. 23, 1983). See also 75 *Am. Soc'y Int'l L. Proc.* 270 (1981).

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American Foreign Policy Toward International Law and Organizations: 1898-1917, 6 *Loy. L.A. Int'l & Comp. L.J.* 185 (1983). See also 76 *Am. Soc'y Int'l L. Proc.* 130, 135, 144 (1982).

The Iranian Hostages Crisis, 63 *Revue De Droit International* 1 (Geneva: 1985).

International Lawlessness in the Caribbean Basin, 21-22 *Crime and Social Justice* 37 (1984). See also *Australia International Law News*, Sept., 1984; 78 *Am. Soc'y Int'l L. Proc.* --- (1984); 78 *Am. J. Int'l L.* 172 (1984).

Statement on Behalf of U.S.A., in *On Trial: Reagan's War Against Nicaragua* 153 (1985).

The Relevance of International Law to the So-Called Paradox of Nuclear Deterrence, forthcoming in *Northwestern Law Review*; and in *Recht En Kritiek* (Dutch translation).

A Critique of the Reagan Administration's Foreign Policy Toward the Middle East from an International Law Perspective, 79 *Am. Soc'y Int'l L. Proc.* --- (1985); and in *Mideast Monitor*, July, 1985.

Conclusions and Judgment of Brussels Tribunal on Reagan's Foreign Policy, *N.Y. Times*, Oct. 7, 1984, at 77.

Book Reviews 75 *Am. J. Int'l L.* 402 (1981); 76 *id.* at 872 (1982); 77 *id.* at 961, 980 & 981 (1983); 79 *id.* at --- (1985).

See also Advisory Committee on Human Rights in Lebanon, *Lebanon: Toward Legal Order and Respect for Human Rights* (1983); 97 *Harv. L. Rev.* 1259 (1984); 75 *Am. Soc'y Int'l L. Proc.* 227 (1981); *International Practitioner's Notebook*, July 1984, Jan. 1985, April 1985, July 1985.

In Progress Nuclear Deterrence and International Law (with Anthony D'Amato); The History of American Foreign Policy Toward International Law and Organizations from 1898 to 1947 (half-finished for Duke University Press).

PROFESSIONAL ACTIVITIES

Ad Hoc Guidelines and Membership Committees, American Society of International Law (1978-80); ASIL Lieber Group on Laws of War (from 1979); U.S. Department of State, Scholar-Diplomat Program, Bureau of Political-Military Affairs (1981); Co-ordinating Council (from 1981) and Board of Directors (from 1985), Lawyers Committee on Nuclear Policy; Human Rights Committee, A.B.A. Young Lawyers Division (from 1981); Advisory Committee on Human Rights in Lebanon, American Friends Service Committee (from 1982); Board of Directors, International Third World Legal Studies Association (1983-1987); Consultant, Amnesty International (from 1983); Fulbright Nominee, Federal University of Brazil, Minas-Gerais (1983); Speaker, 21st Senior Conference, U.S.M.A. West Point (1983); Committee on International Terrorism, Am. Branch, Int'l Law Ass. (from 1983); Counsel, 1984 Nuclear Arms Race Moratorium Resolution; National Sponsor, U.S. Out of Central America (from 1984); Judge, Provisional District World Court (from 1984); Chairman, Panel of Jurists, IPO Brussels Conference on Reagan Administration's Foreign Policy (1984); Advocate for U.S.A. in Nicaragua v. U.S.A., Brussels Permanent Peoples' Tribunal (1984); Steering Committee, Concerned Academics for Peace and Justice in the Middle East (from 1984); Advisory Board, American Bibliographical Center: Political Science (1985-88); Legal Committee, Campaign for U.N. Reform (from 1985).

September 13, 1985

The Hon. Christopher Dodd
United States Senate
Washington, D.C. 20510

Re: U.S.- U.K. Supplementary Extradition Treaty

Dear Sen. Dodd:

With this letter, I am submitting on behalf of Richard Lawlor and the Irish American Unity Conference of Connecticut, the statement of the IAUC before the Senate Foreign Relations Committee regarding the above-referenced treaty. The IAUC is grateful for the opportunity to submit this statement and for the assistance which your office has given us in doing so.

We would like to call a minor point to your attention: the concerns which we have regarding the British system of justice in Northern Ireland also arose in an earlier, separate context. A resolution on Northern Ireland was submitted by me as a member of the American Bar Association to the ABA's annual meeting in Washington, D.C. in July, 1985. A copy of the resolution is enclosed. The resolution was sent with a cover letter to all members of the Foreign Relations Committee on September 4, 1985. A copy of the letter is enclosed.

The cover letter explains that the ABA deferred a vote on the resolution pending an investigation of the facts underlying the resolution. Those same facts also underly and are pertinent to the extradition treaty: the absence of the usual protections of law one would expect from a democratic society in Northern Ireland, the brutality of the British penal system and security forces, and the repression with which attempts of Irish nationalists to protest these conditions is met.

Since the American Bar Association committees have not yet completed their investigation or submitted their report to the Association as a whole, it is our understanding that the ABA has no official position on the facts crucial to the Senate's decision on the treaty.

As of this writing, we understand that Arthur W. Rovine, Esq., Chairman of the Section on International Law and Practice of the American Bar Association, will be giving testimony before this Committee on September 18, 1985. This is so even though American Bar Association President William Falsgraf and Mr. Rovine both have stated that there will be no testimony on behalf of the American Bar Association, (letter from Arthur Rovine to Jeanne B. Clarizio dated August 16, 1985, enclosed; telephone call to Jeanne B. Clarizio from Mr. Falsgraf's office on September 11, 1985, in response to letters from Clarizio to Falsgraf dated September 10, 1985, enclosed).

We would be satisfied with their responses were it not for our fear that the Committee, the Senate and the public will attribute to Mr. Rovine's testimony the weight of the American Bar Association. Our fears are not allayed by the facts that the American Bar Association Government Relations Office has been studying the Treaty with a view to testimony before this committee and has been consulting with Mr. Rovine about the issue. (Telephone conversation between Jeanne B. Clarizio and Mr. Craig Baab, staff member of the American Bar Association Government Relations Office, September 11, 1985).

We hope that the Senators who hear the testimony Mr. Rovine is scheduled to give will bear in mind the foregoing. By his own admission, Mr. Rovine is speaking on his own behalf and not on behalf of the body of the membership of the American Bar Association.

Best regards -

Jeanne B. Clarizio

STATEMENT

OF

RICHARD P. LAWLOR, ESQ.
JEANNE CLARIZIO, ESQ.
MICHAEL GRAHAM, ESQ.

IRISH AMERICAN UNITY CONFERENCE
STATE OF CONNECTICUT

CONCERNING

1985 SUPPLEMENTARY TREATY TO
THE 1972 UNITED STATES-UNITED KINGDOM
EXTRADITION TREATY

September 18, 1985

Honorable Chairman and Members of the Senate Foreign Relations Committee:

On August 1, 1985, the Administration, through the testimony of Abraham D. Sofaer, Legal Adviser to the State Department, and D. Lowell Jensen, Deputy Attorney General of the United States Justice Department, sought ratification of the proposed United States and United Kingdom Extradition Treaty. Their conclusion was in fact based upon presumptions fundamentally in error. The danger presented by ratification is therefore compounded.

Very few of us have any difficulty in recognizing human rights abuses committed by clearly established repressive regimes. Examples of countries with little or no traditions of democratic government committing such abuses abound: Libya, South Africa, etc., etc., etc. Clearly recognized, abuses in these countries are easily denounced. In the absence of a tradition of democratic government, such abuses are easily enacted as government procedure.

The obverse to human rights abuses in non-democratic countries becomes therefore enticingly easy to accept: that democracy necessarily ensures that such abuses do not take place. In the case of a country closely linked to our own in tradition, culture, language, law and history, the urge to believe that the nature of that country's democracy is equal to our own, and that concern for the dignity of each human being ranks as high in the moral value system of that country, may become overwhelming. The result may be that assumptions are accepted without examination of their foundations and that important questions go unasked.

Comments made in support of ratification on August 1, 1985, are classic examples of uninformed belief, myth being accepted despite the evidence of cold harsh facts in abundance. Mr. Sofaer in his remarks said that "with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." He stated further that "violence is therefore not the result of a lack of opportunity to engage in the democratic process."

The long and ignominious history of British interference in Irish affairs, especially with regard to the past sixty odd years of enforced partition against the overwhelming desire of Irish people (80% opposed it in the only election ever held on the question in 1918), is a virtual study in tyranny, in direct opposition to the remarks of Mr. Sofaer. Britain's rule in Ireland is neither democratic (it is direct colonial rule), nor is the judicial system fair (it is in practice and procedure biased martial law).

-2-

To amplify on the use of internment, gerrymander, assassination squads, regular house wreckings and daily harassment, strip searches, juryless courts with Orange judges and bribed, brainwashed witnesses, plastic bullets, government-sanctioned torture, official discrimination in housing, employment and political and civil affairs would take great amounts of this Committee's time but could be documented in detail according to any standard of proof so required by the Committee.

Our concern and plea to the Committee is therefore this: peel away the thin veneer of democracy which is the figment of propaganda and you will find a regime which is among the world's worst respectors of citizens it claims are its own and--because it portrays itself as a democratic nation in accord with American tradition while it simultaneously practices barbarity--is among the most dangerous of world governments.

To oppose this regime is in exact accord with all American history. To abandon refuge to those who do so is in direct contravention of more than one hundred years of United States law, tradition and United States-United Kingdom relations.

Our request for defeat of this treaty is not made in a vacuum. Both because of many years of study of this issue and because of personal presence in British-occupied Ireland (Lawlor led a delegation of Americans the past two summers there, one of which delegations was brutally attacked by British forces, resulting in death and serious injury, which brought forth no statement of concern by the United States Administration; Graham has visited British-occupied Ireland on several occasions on behalf of the National Lawyers' Guild; Clarizio has also visited the area on a fact-finding tour), many of us have had ample reason to apply American standards of justice and democracy to the reality of British-occupied Ireland. Based upon our observations and upon the logical conclusions drawn therefrom, we feel very strongly that the United States ought not to allow Britain to shame the concept of democracy the world over by hoodwinking the world's greatest democracy. Let them do their own dirty work, and let us then stand before the world with Irish aspiration for freedom. When the scaffold is removed next year, let us with pride truly let our Statue of Liberty shine forth the beacon of freedom.

Thank you for your consideration of our views.

Richard P. Lawlor
Richard P. Lawlor, Esq.

Jeanne Clarizio
Jeanne Clarizio, Esq.

Michael Graham
Michael Graham, Esq.

September 4, 1985

Richard G. Lugar
United States Senate
Washington, D.C. 20510

Re: U.S.-U.K. Supplementary Extradition Treaty

Dear Senator Lugar:

On September 18, 1985, the Foreign Relations Committee will hold a second hearing on the above-referenced treaty. I write you in your capacity as a member of that committee to offer a small piece of information that may be useful in your deliberations.

Both as an American citizen and as an attorney, I have a profound respect for our Constitution and Bill of Rights. The protections which they offer are the hallmarks of a democracy. I share with many others the view that the "emergency" legislation in place in Northern Ireland abrogates many of these protections.

This concern led me to submit a resolution on legal and human rights in Northern Ireland at the 1985 annual meeting of the American Bar Association. The resolution, a copy of which is enclosed, is presently before two committees of the ABA for study: the International Law Committee of the Section on Individual Rights and Responsibilities and the International Law Committee of the International Law Section. Those two sections, under the chairmanships of the Hon. Abner J. Mikva and Arthur Rovine, Esq., respectively, are to investigate the facts and report back to the ABA at its next meeting. The ABA Resolutions Committee and Assembly deferred a vote on the resolution pending the results of that investigation.

Therefore, although the Administration's spokespersons on the treaty have high praise for the British system of justice, and although both governments blink at eviscerating the political offense exception because it is "not suitable...between two democratic countries sharing the same high regard for the fundamental principles of justice," the issue of British regard for human rights in Northern Ireland remains an open question as far as the ABA is concerned. When that organization has scrutinized even those few points my resolution addresses, I feel confident it will conclude that whatever situation obtains in the rest of the United Kingdom, British regard for fundamental principles of justice is painfully absent in Northern Ireland.

Very truly yours,

Jeanne B. Clarizio
140 Russ Street
Hartford, CT 06106

American Bar Association

August 16, 1985

Ms. Jeanne B. Clarizio
Day, Perry & Howard
City Place
Hartford, Connecticut 06103-3499

Dear Ms. Clarizio:

Thank you for your letter of August 14, 1985. I have sent a copy of the resolution concerning Northern Ireland to Amy Young, the Chairman of our Section's Human Rights Committee. You should stay in touch with her if you wish to follow developments with respect to this question. She can be reached at 1346 Connecticut Avenue, N.W., Suite 502, Washington, D.C. 20036.

With respect to the Supplementary Extradition Treaty between the United States and Great Britain, there will be no testimony on behalf of the ABA. I am not yet certain whether I will be testifying on my own behalf, but that should become clear before the end of the month.

Sincerely,

Arthur W. Rovine

Arthur W. Rovine
Chairman
Section of International
Law & Practice

AWR/dch

cc: Mr. Louis Sohn (v.c. chairman of section)
Ms. Cynthia Price (secretary, staff person)



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DAY, BERRY & HOWARD

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 Hartford, Stamford and Bridgeport, Conn.

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Jeanne B. Clarizio
 275-0133

September 10, 1985

FEDERAL EXPRESS

William W. Falsgraf, Esq.
 President, American Bar Association
 c/o Regent Hotel
 201 Marquette, N.W.
 Albuquerque, New Mexico 87102

Dear Mr. Falsgraf:

I am an ABA member and I am writing to discuss an issue of some immediacy.

It has come to my attention that you are considering testifying before the Senate Foreign Relations Committee next week in favor of the Supplementary Extradition Treaty between the U.S. and Britain.

The Treaty necessarily involves an issue which was also the subject of a resolution I submitted to the ABA annual meeting in Washington, D.C. this July: the adequacy of protection of individual rights under the legal system as it operates in Northern Ireland.

The Assembly deferred a vote on my resolution; instead, it voted to send the issue to two ABA committees for study so that the ABA can look into the matter before it takes a position. Therefore, it was and is my understanding that no official ABA position will exist until the study is completed.

I sent the enclosed letter to all members of the Senate Foreign Relations Committee to make them aware of my resolution and the ABA investigation it prompted. It occurred to me after sending the letter that I should make it available to you. When I heard that you might be testifying in support of the Treaty, I thought that perhaps you were unaware of the action taken at the Washington meeting and the investigation now underway. I am sure you would wish to avoid any appearance of conflict, and I

DAY, BERRY & HOWARD

William W. Falsgraf, Esq.
September 10, 1985
Page 2

believe such an appearance might exist if the ABA President were to testify in any capacity in favor of a treaty whose underpinnings are simultaneously before two ABA committees for study.

I hope that this information has been of some help to you.

With kindest regards,

Jeanne B. Clarizio

Jeanne B. Clarizio

JBC:cly
Enclosures

ABA RESOLUTION

Submitted by Jeanne Bishop Clarizio

Whereas, freedom from unreasonable search and seizure and the right to a speedy, fair and public trial are cherished by this Association as basic human rights to which all persons, and especially citizens of a democracy, ought to be entitled; and

Whereas, the British government has imposed upon the six counties of Northern Ireland it occupies a legal system which deprives Irish citizens of the above-named rights through the use of warrantless searches and arrests, juryless trials, and convictions of crimes upon less than thoroughly tested evidence; and

Whereas, all governments have the duty to uphold the dignity of individual human beings; and

Whereas, the British government has instituted a policy of routinely strip searching Irish Republican women prisoners, not as a valid security measure, but as a means to humiliate and degrade such women; and

Whereas, the police authorities have as their primary obligation the safety and protection of the general public; and

Whereas, the British government has adopted a policy of engaging in summary execution of unarmed Irish suspects by its military and police forces; and

Whereas, the right to peacefully assemble ought to be enjoyed by all persons, especially citizens of a democracy; and

Whereas, the British government has dispersed unarmed, peacefully assembled Irish civilians through the use of plastic bullets, which use is illegal in England because such bullets are correctly thought to be lethal;

Therefore, be it resolved that this Association condemns these deprivations of legal and human rights and urges the U.S. government to call upon Great Britain to cease such actions immediately.

*Reind
insert*

September 5, 1985

The Honorable Richard G. Lugar
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I know that Mr. Richard Lawlor, a constituent of mine, has written to the Committee for the purpose of requesting an opportunity to testify on the proposed Protocol to the 1972 United States-United Kingdom Extradition Treaty.

Mr. Lawlor currently serves as President of the Irish American Unity Conference in Connecticut and is obviously interested in the ramifications of the Protocol with respect to Northern Ireland. Though he and I do not always see eye to eye on the Northern Ireland question, I firmly believe that Mr. Lawlor's interests, knowledge, and experience in this area would provide the Committee with a number of useful insights.

I realize that the amount of time available for testimony on the Protocol is limited but, I strongly believe that if Mr. Lawlor could be accommodated as one of the Committee's public witnesses, his testimony would make a useful contribution to the Committee's understanding of this controversial treaty issue.

I greatly appreciate your consideration of this matter.

Sincerely,

[Signature]
CHRISTOPHER J. DODD
United States Senator

Irish American Unity Conference

State of Connecticut
Regional Office
11 Harwich Street
Hartford Conn 06114

Richard Lawlor Esq.
Chairman
203-247-4819
525-8417

August 30, 1985

Mr. Richard E. Messick
Chief Counsel
Senate Foreign Relations Committee
Washington, DC 20510

Dear Mr. Messick:

This is to request of you that I be allowed to testify before the Senate Foreign Relations Committee with regard to the proposed U.S.-U.K. Extradition Treaty. It is my understanding that the Senate Foreign Relations Committee will resume hearings on September 16, 1985.

By way of background, I am State President of the Irish American Unity Conference in Connecticut, Publicity Director for the Northeastern United States for Irish Northern Aid, a member of the National Political Education Committee, and a member of the Ancient Order of Hibernians. I am also a former State Representative from Hartford in the Connecticut General Assembly and am now and have been for many years concerned about public affairs in both my community and country. A more complete biography is enclosed for your convenience.

Like many Irish Americans I am deeply disturbed by the treaty now being proposed which would allow extradition for Irishmen whom our courts have deemed to have committed acts which would be protected under the political offense exception to the current U.S.-U.K. Extradition Treaty. Given Britain's historic brutal treatment of Ireland and her people this exception is not only necessary, it is vital to the ability of the Irish people to continue to seek the same freedom for Ireland that we enjoy here in America. That the Irish were instrumental both in establishing and maintaining the freedoms which we enjoy here in America make it all the more important that we repay a moral debt to Ireland that is long overdue.

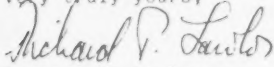
I fully realize that there are actions that the IRA, a guerrilla army operating largely on individual initiative, may engage in which would go beyond the bounds of military ethics as we know them. That same principle holds true for our own armed forces and the American people have been quick

Mr. Richard E. Messick
August 30, 1985
Page 2

to criticize any such actions by whomever they may have been committed. The fact of the matter, however, is that the IRA has engaged British forces whose leaders have publicly stated that they are at war with the IRA in accord with American principles and in a manner far above that of British forces.

I congratulate the Senate Foreign Relations Committee on holding extensive hearings on this issue, and I hope that this will lead to much broader questioning over America's role with regard to British interference in Irish affairs. In so doing we are honoring George Washington's pledge to Ireland of our prayers and hopes for Ireland's freedom. With America's help Ireland can be free to resume her historic role in the world community of nations.

Very truly yours,



Richard P. Lawlor

RPL/nh

Enclosure

cc: Senator Richard Lugar

cc: Senator Christopher Dodd

"RICH LAWLOR"

Rich was born in Hartford on 11/30/46. He attended Hartford schools graduating from H.P.H.S. in 1964. He is a U.S. Navy veteran having served two tours in Vietnam aboard the destroyer U.S.S. Higbee.

Rich graduated from Greater Hartford Community College and Central Connecticut State College with honors-class of '72' and from the University of Connecticut Law School-class of '75'. He is now engaged in the private practice of law with offices in Hartford.

Some of the positions which Rich has held are as follows:

Past President of the Hartford Young Democrats and Connecticut Young Democrats.

Past Assistant Corporation Counsel-City of Hartford

Former legal counsel to the Hartford Democratic Town Committee

Former Connecticut State Representative from Hartford

Past member of the Executive Board of the United Irish

Societies and former Chairman of the Hartford Parade

Committee for the St. Patricks Day Parade

Member of the Knights of Columbus and the Irish-American Home Society.

Rich lives in Hartford with his wife, the former Kathleen Mangan, and their three children. He is currently Publicity Director for the Northeastern States for Irish Northern Aid and spokesman for the Hartford Unit for Northern Irish Aid. Rich delivered the eulogies for each of the ten hunger strikes at the Memorial Masses held at St. Peters Church in Hartford during 1981.

Rich recently returned from a trip to Ireland and the occupied six counties having met with governmental, civic and religious leaders to exchange views regarding the problems of Ireland.



1982 IRISHMAN
OF THE YEAR

1968- Elected State President, Irish American Unity Conference.

1984/85- Led a tour each year of approx. 125 Americans to occupied Ireland, during which tour in 1984 a large crowd peacefully gathered was attacked by British forces - resulting in the death of one man and many injured - including Americans.

Responses from Judge Sofaer to Questions from Senator Dodd

Senator Dodd

Q-1. Please provide an analysis of the Diplock court system.

A. An analysis of the Diplock Court system is attached.

Diplock Court SystemNorthern IrelandI. Background

In the early 1970's, the British government found itself unable to control the rapidly escalating violence in Northern Ireland through ordinary criminal justice procedures. The government resorted to interning suspected terrorists without trial at the direction of the Executive for Northern Ireland. Recognizing the dangers inherent in this unfettered executive power, Parliament enacted in 1972 a more regular system of administrative detention for suspected terrorists. This system remained extra-judicial, however, and was considered foreign to the common law and in contravention of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention on Human Rights").

In 1972, the British government responded to public criticism of the detention procedures by appointing a commission, headed by the jurist Lord Diplock, to recommend new legal procedures for dealing with terrorist activities in Northern Ireland. The Commission issued a report recommending that the government return to controlling terrorism through courts of law (although it recommended that administrative detention be preserved for extreme cases). The Commission recommended creation of a separate trial court for terrorist crimes, which would provide substantially greater procedural safeguards than the administrative detention system, but fewer safeguards than ordinary criminal courts. The new courts would at minimum comply with the requirements of Article 6 of the European Convention on Human Rights.

Most of these recommendations were adopted by various statutes enacted in 1973 and thereafter. These provisions were consolidated in the Northern Ireland (Emergency Provisions) Act 1978 ("the 1978 EPA"). Although detention did not end with the creation of the "Diplock" courts, it was used less frequently and was finally phased out as the security forces grew capable of arresting and convicting suspected terrorists under the new judicial procedures.^{1/}

^{1/} The last detention order was issued in 1975, and all detained persons were released by the end of that year. The statutory provisions for detention, section 12 of the 1978 EPA, were not renewed by Parliament in 1980, but the Secretary of

[Footnote continued on next page]

The criminal justice system in Northern Ireland is based upon an Act of Parliament, the 1978 EPA.^{2/} The 1978 EPA must be renewed by Parliament every six months. Parliament has also enacted a series of anti-terrorism statutes for the entire United Kingdom, now known as the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 PTA"). The renewal provisions in that Act are similar to those of the 1978 EPA.

II. Provisions Affecting Individual Rights

A. Search and Seizure

The English law of search and seizure has recently been restated and modified by the Police and Criminal Evidence Act of 1984 ("the 1984 PCEA"). The rules are generally similar to those in the United States. Whereas the U.S. standard is "probable cause," the U.K. standard is "reasonable grounds" for the search. In practice, the two standards are similar. As in the United States, a warrant is required for most searches of private premises; typical exceptions exist for emergencies, hot pursuit, etc. A warrant is not required to search a person or vehicle in a public place, so long as there are reasonable grounds for the search; nor is a warrant required for a search pursuant to an arrest. Written reports must be made of all searches of persons or vehicles not pursuant to an arrest warrant. England does not have a statutory exclusionary rule for illegally seized evidence. However, courts may exclude illegally obtained evidence in exercising their power to exclude unfairly prejudicial evidence in the interests of justice.

[Footnote continued]

State for Northern Ireland retains the power under section 33(3) of that act to revive them immediately by order. Because the use of detention contravenes the European Convention on Human Rights and the U.N. Covenant on Civil and Political Rights, Britain has filed notices of derogation under the emergency derogation provisions of those instruments.

^{2/} The 1978 EPA is a consolidation of the 1973 EPA, which enacted most of the Diplock Commission's recommendations, and the 1975 EPA, which had amended the 1973 EPA pursuant to the recommendations of a commission created by Parliament to study the operation of the 1973 EPA (the Gardiner Commission). Parliament recently commissioned a new study of the 1978 EPA by Lord Baker. His recommendations are being considered by Parliament for inclusion in a revised EPA.

The 1978 EPA grants the police and British soldiers broader power to conduct searches and seizures in Northern Ireland. Police and British soldiers stationed in Northern Ireland have the power to enter any premises (except for dwelling houses) or vehicles to search for munitions and radio transmitters. To enter and search a dwelling house for munitions or transmitters, there must first be a suspicion that those articles are present; a soldier must then obtain authorization from an officer, and a policeman must have authorization from someone of the rank of chief inspector or above (§ 15). Soldiers and police may also stop and search any person in public for munitions and transmitters. If the person is not in a public place, he may be searched only if the policeman or soldier suspects he has munitions or ammunition.

Upon authorization by a superior officer, soldiers and policemen may also enter and search any place to ascertain whether someone is being unlawfully detained there or is in physical danger (§ 17). Soldiers or police may also enter any place when necessary to preserve the peace or maintain order (§ 19). Except for the power to stop and search persons for munitions or transmitters (§ 15(3)), no provision in the 1978 EPA allows general stop and frisk powers such as are available to police in the United States. As in England, only searches pursuant to an arrest are generally permitted (PCEA § 32).

B. Arrest

The general rule in England is that a policeman may arrest someone without warrant only if he has reasonable grounds for suspecting that the person has committed, is in the act of committing, or is about to commit an offense (§§ 25, 26). Except under the provisions of the 1978 EPA, no one may be arrested solely for questioning. A policeman may also arrest someone in order to protect the public or because he has reasonable grounds to doubt the person's stated name and address. The law in England and Northern Ireland requires that a policeman inform the arrested person of the ground for the arrest as soon as practical; if the policeman fails to do so, the arrest is unlawful. The 1978 EPA makes an exception to this rule for a soldier, who need only state he is making an arrest as a member of Her Majesty's forces.

Prior to enactment of the 1984 PCEA, an arrested person in England had to be brought before a magistrate within 24 hours of arrest (except, in the case of a "serious offense," only "as soon as practicable"). In practice, these rules resulted in detentions without charge for an uncertain time (often up to three or four days). The 1984 PCEA has changed the common law rule to provide that only in cases of serious offenses, where an investigation is being carried out diligently and

expeditiously, may detention without charge extend beyond 24 hours. An officer of the rank of superintendent or above who is in charge of the police station at the time must authorize any additional detention up to 36 hours after arrest. Beyond 36 hours, continued detention without charge may occur only upon a warrant issued by a Magistrate's Court for up to an additional 36 hours. The warrant may be renewed up to 96 hours total before the arrestee must be released or charged.

The 1978 EPA changed the law of arrest in Northern Ireland in three respects. First, it allows the police to arrest anyone "suspect[ed] of being a terrorist" (not suspected of any specific crime) and to hold the person up to 72 hours for questioning. The term "terrorist" is not defined (§ 11). Second, the EPA changes the "reasonable grounds for suspecting" standard of warrantless arrest to one of mere suspicion (§ 12). Third, the EPA permits a British soldier to arrest a person on suspicion of an offense and hold him up to four hours for questioning (§ 13).

The 1984 PTA and its predecessor laws give wider powers of arrest to police throughout in the United Kingdom. Under the PTA, the police may arrest anyone reasonably suspected of the "commission, preparation or instigation of acts of terrorism" connected with Northern Ireland (§ 12). This standard requires less than reasonable suspicion that a specific illegal act has been committed, but unlike the EPA provision authorizing arrest on suspicion of being a terrorist, the PTA ties the suspicion to specific acts. The 1984 PTA arrest power allows detention for questioning up to 48 hours (and, in the discretion of the Secretary of State, for up to five additional days). Police in Northern Ireland can release a suspected terrorist after detention under either the EPA or PTA and then rearrest him under the other statute.

C. Admissibility of Confessions

In offenses involving terrorism in Northern Ireland, rarely can witnesses be found who will agree to testify. Convictions, are usually based upon confessions or incriminating statements made by a defendant. As a result, police interrogation plays an important role in gathering evidence to convict terrorists. In the last fifteen years, the law in Northern Ireland has accommodated greater police powers to arrest and detain for questioning, but it has also been modified to limit the potential for abuses.

1. Right to Silence

There is no duty in England or Northern Ireland to answer questions put to a person by the police. The only exception is

under the 1978 EPA, which imposes a duty to identify oneself properly when asked to do so by a policeman on the street and to answer his questions about "any recent explosion or any other incident endangering life or concerning any person killed or injured in any such explosion or incident" (§ 18). The right to silence in the United Kingdom does not forbid (until after an indictment) continued questioning by the police of anyone asserting that right. In England (and in Northern Ireland), police are no longer allowed to question an arrestee at all after indictment.

2. Admissibility Standard

Before enactment of the EPA in Northern Ireland and the PCEA in England, the common law rule of admissibility of confessions was known as the "voluntariness" standard: after arrest, only a voluntary confession could be used against a defendant. This standard was interpreted to mean that any statement obtained by "fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression" was inadmissible. Northern Ireland courts interpreted the voluntariness standard even more strictly than the English courts: "any set-up [by the police] which makes it more likely that those who did not wish to speak will eventually do so" was ruled to make a statement obtained thereby "involuntary" and thus inadmissible. This rule prohibited almost all modern psychological interrogation techniques.

The Diplock Report found that the prevailing voluntariness standard was so rigid that it had forced the authorities to resort to extra-legal administrative detention proceedings instead of trying confessed terrorists in courts of law. The Diplock Report recommended, and the 1978 EPA adopted (§ 8), the admissibility standard found in Article 3 of the European Convention on Human Rights: all statements of a defendant are admissible, unless he presents prima facie evidence that he was subjected to "torture or to inhuman or degrading treatment in order to induce him to make the statement," whereupon the prosecution must satisfy the court that the statement was not so obtained. Since the Convention standard was adopted, the European Court of Human Rights has interpreted it to permit a certain amount of rough treatment of a suspect, including slapping his face.

The Diplock courts have interpreted the EPA admissibility standard as preserving their common law discretion to exclude confessions "in the interests of justice." They have exercised this discretion in cases in which evidence existed of physical maltreatment of the defendant by police.

3. Right to Counsel

In England and Northern Ireland, the Judges' Rules provide that whenever an arrested person demands to see a lawyer, the police must stop questioning him and give him the opportunity to notify his attorney (or a friend or relative) or to arrange for counsel to be appointed. Police are permitted to delay a meeting between the arrested and his counsel if they believe that it would cause unreasonable delay or hindrance to the process of the investigation or to the administration of justice. In serious cases, arrested persons were often unable to meet with counsel until after indictment. Parliament therefore adopted for Northern Ireland (as part of the Royal Ulster Constabulary ("RUC") code of conduct) the rule that a defendant has an absolute right to see an attorney after 48 hours, and every 48 hours thereafter. Each arrested person must be given a printed notice of his right of access to an attorney.

D. Limitations on Speech and Assembly

The EPA establishes as a criminal offense actual or professed membership in one of eight terrorist organizations (along with solicitation of support for members of those organizations, or carrying out their orders) (§ 21). The 1984 PTA contains a similar provision for England, applicable to two of the groups listed in the 1978 EPA. Both acts grant the Secretary of State power to add or remove an organization from the list of proscribed groups if it "appears to him to be concerned in terrorism or in promoting or encouraging it." The Republic of Ireland also proscribes organizations, specifically the IRA since 1939. Penalties run to ten years under the EPA, five years under the PTA and 7 years in the Republic of Ireland. Baker considered arguments that membership in certain groups should not be outlawed, but concluded that the prohibition was an important symbol for the people, both as an expression of public outrage at the acts of the groups involved and as a disincentive to youths considering joining up.

The 1978 EPA renders illegal collecting, disseminating or possessing information about individual police, soldiers, judges, or prison employees that might be useful to terrorists planning acts of violence. The burden is on those charged to show a reasonable excuse. The EPA also proscribes training persons in the use of firearms and explosives, dressing or behaving in public like a member of a proscribed organization, wearing a hood in public (§§ 21-23, 25-26). The 1984 PTA also makes it a crime to withhold information that might help prevent terrorist acts or aid in the apprehension or prosecution of a terrorist (§ 11). In order to cut off support for terrorist groups, Section 10 of the PTA makes it a crime to solicit or accept "any money or other property ... intending that it shall be applied or used for or in connection with the commission, preparation or instigation of acts of terrorism

[connected with Northern Irish affairs] (§ 10)."

E. Miscellaneous Provisions

1. Burden of Proof for Possession of an Illegal Object

The Diplock Report found that the government's burden of proving that a defendant was in possession of terrorist objects (e.g., arms, ammunition explosives) found in the same place as the defendant or in a place he frequented was too high: perpetrators of terrorist bombings and shootings are rarely caught in the act; testimony of witnesses is difficult to obtain in Northern Ireland because of sympathy and intimidation; and terrorist acts need to be prevented before they claim innocent victims.

Following Lord Diplock's recommendation, the 1978 EPA relieves the prosecution of part of the burden of proving possession. It creates a permissible inference that, if certain illegal articles (firearms, ammunition or explosives) are found on the same premises as the defendant, or in a place he occupied or "habitually used otherwise than as a member of the public," then the court "may accept the fact proved as sufficient evidence of his possessing...that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or, if he did know, that he had no control over it" (§ 9(1)). In effect, the provision forces a person on the premises where the proscribed articles are found to explain himself. It does not affect the legal standard of proving possession beyond a reasonable doubt. Similar burden of proof provisions exist in the United States and have been held constitutional by the Supreme Court. For example, in County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979), the Court upheld a New York statute that made the presence of a firearm in an automobile presumptive evidence of its illegal possession by all persons occupying the vehicle.

2. Young Persons

The 1978 EPA also adopted several provisions recommended by with respect to youths who shoot soldiers or commit other specified crimes. The Act permits the Secretary of State to direct that any "young person" (age 14 through 16) may be held without bail in such custody as is necessary to ensure his safety or that of others (e.g., by imprisonment) (§ 3). Such direction must be renewed every two months. The Act permits a court to imprison a young person convicted of an offense which is punishable in the case of an adult for five years or more (§ 10). The maximum term for those crimes requiring remand to a juvenile home is six months.

3. Exclusion

In order to deal with the problem of importation of terrorism, the PTA authorizes the Secretary of State to issue exclusion orders. Such orders expire after three years and may be revoked by subsequent order of the Secretary. The Secretary may exclude any person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" that are "designed to influence public opinion or Government policy with respect to affairs in Northern Ireland," or who is attempting or may attempt to enter ... with a view to being concerned in the commission, preparation or instigation of such acts of terrorism..." (§§ 3(6), 4(1)). These orders can exclude an individual from Northern Ireland, Great Britain, or the United Kingdom. British citizens who are ordinarily resident in the area from which exclusion is sought are not subject to an exclusion order.

IV. Special Criminal Courts: "Diplock Courts"

Based upon the recommendation of the Diplock Report, the EPA creates a second type of criminal court in Northern Ireland, known colloquially as "Diplock courts." Their principal distinction from ordinary criminal courts in Northern Ireland is that they have no jury; all offenses are tried before a single judge (§ 7). Appeals are taken as of right to a three-judge panel of the Court of Appeals.

A. Jurisdiction

The jurisdiction of the Diplock Courts extends to all trials in which any charge against the defendant is for one of a specified set of common law offenses characteristic of terrorism and listed in schedule 4 of the EPA. "Terrorism" itself is not a crime under the EPA although suspicion of being a terrorist is grounds for detention for questioning under § 11 of the EPA and § 12 of the PTA). The scheduled offenses include murder, kidnapping, assault, conspiracy, crimes involving firearms or, explosives, arson, belonging to a proscribed organization, aggravated burglary and mayhem (schedule 4). The EPA does not provide for distinguishing non-terrorist offenders of the scheduled crimes and trying them before a jury.

B. Trial by Judge Alone

Although the right to trial by jury is all but gone in civil trials in England (though not in Scotland or Northern Ireland), it is still available as of right in all criminal trials, except for those under the 1978 EPA. The primary reason that the EPA provides for trying terrorist cases before a judge alone is Lord Diplock's observation that the jury system was in danger of a complete breakdown in Northern Ireland. Terrorists were engaging in actual intimidation of juries, and there was widespread fear of retaliation for "bad" jury verdicts. As

Lord Diplock observed, "[a] frightened juror is a bad juror even though his safety and that of his family may not actually be at risk." Seating a jury had become difficult because of nearly endless rounds of challenging potential jurors by both sides. Trial by a panel of one's peers, seldom occurred: juries tended to be almost exclusively made up of protestants in trials of republican terrorists. Loyalist suspects were rarely convicted by protestant juries.

Although trial by jury is a treasured part of the Anglo-Saxon legal heritage, it is not considered essential to just trials in most legal systems of the world (including many inheritors of the British common-law tradition). Unlike a jury, the judge in a Diplock court must state reasons for his decision in writing. His decisions of fact as well as of law can be overturned on appeal. Acquittal rates in Diplock courts are very similar to those in the jury courts of Northern Ireland; indeed in 1983 the rate for Diplock courts was higher.

C. Bail

The 1978 EPA removes the power to grant bail from magistrates and justices of the peace and makes it available only upon application to a High Court judge (or to the trial judge when trial is adjourned). Threats, intimidation and actual violence created intolerable pressure on magistrates and justices of the peace.

Requirements for bail have also been modified. At the time of the Diplock report, the likelihood that the accused would continue to commit crimes if released was not a grounds for denial of bail in Northern Ireland (although it was in England). The EPA made that a ground for denying bail. The EPA also added a requirement that all other conditions of bail must be complied with and that the accused may not interfere with any witness.

The EPA shifts onto the accused the burden of satisfying the High Court judge that he has met the requirements for bail; in England, the burden is on the prosecution. Between 1973 and 1982, around 40% of bail applications to the High Court were granted.

D. Right to Counsel

In England and Northern Ireland, a person has an absolute right to be represented by an attorney at trial and (subject to the provisions for delay discussed above) in the police station before indictment. A defendant must always be informed of his right to counsel. Moreover, in Northern Ireland, an application for legal aid must be granted unless the defendant is found to have sufficient financial means to obtain his own counsel. Usually, an indigent defendant is provided both a barrister and a solicitor. By contrast, in England the right

to free counsel is not absolute except when a defendant is tried for murder or when the the prosecutor takes an appeal.

E. Right to Confrontation

All defendants have a common law right to confront the witnesses against them at trial. Traditionally, that right has extended to proceedings leading to indictment (the "committal proceeding" in England and the "preliminary enquiry" in Northern Ireland). The prosecution and the suspect may present evidence in the form of written statements, but either side may refuse to accept such form of evidence and demand that witnesses give live testimony.

In some cases in Northern Ireland in which indictments were based on the testimony of accomplices (called "supergrasses"), these preindictment proceedings became particularly chaotic, with spectators shouting threats at the witness to make him change his mind about giving evidence for the prosecution. As a result, the prosecution has occasionally invoked a little-used procedure that has long existed in England and Northern Ireland, the "voluntary bill of indictment." This procedure enables the prosecution to apply for an indictment in an ex parte proceeding to a judge of the High Court, Court of Appeal, or Crown Court; the accused has no right to be heard or to confront witnesses against him. In cases in which the testimony of a "supergrass" accomplice is the sum of the prosecution's evidence, use of the voluntary bill deprives the defense of an early opportunity to hear and cross-examine the "supergrass." In the United States, a defendant has no right at all to confront witnesses before indictment.

One potential area for unfairness in preindictment proceedings was dealt with by the judiciary itself. The Northern Ireland preliminary enquiry proceeding does not provide for the committing magistrate to edit out inadmissible, prejudicial material from the statements given before sending them to the trial judge with the indictment. This is sensitive because of the judge's role as sole trier of guilt or innocence in Diplock courts. On his own initiative, the Lord Chief Justice instituted a pretrial review proceeding, whereby another judge reads and edits committal papers before they are sent to the trial court, to ensure the trial judge sees no prejudicial material inadmissible at trial.

F. Supergrasses

"Supergrass" is British slang for an accomplice who becomes a witness for the prosecution against his former colleagues. In the last few years the police in Northern Ireland have made widespread use of the testimony of republican and loyalist insiders, themselves often guilty of serious crimes. Supergrass testimony has resulted in some well-publicized convictions based solely on the basis of the supergrass's

uncorroborated testimony.

Accomplice testimony, especially when given in return for leniency, has been viewed with distaste for centuries in England. Yet accomplice and co-conspirator evidence has always been admissible in England, so long as the trial judge first warns the jury that, although they may find the defendant guilty solely on the basis of the accomplice's testimony, it is "dangerous" to do so. Opposition to the use of supergrass testimony focuses on the fact that, because there is no jury in Diplock courts, the judge can only warn himself. In at least one major trial of 35 IRA defendants, however, a judge did dismiss the charges after declaring the evidence of the prosecution's supergrass "entirely unworthy of belief." Accomplice and co-conspirator evidence has always been admissible in U.S. courts, subject only to the trier of fact's evaluation of its credibility.

V. Government Responses to Charges of Unfairness

The British government has been very responsive to criticisms of its handling of security in Northern Ireland. In 1971 the government of Ireland lodged a complaint with the European Commission on Human Rights, alleging that British authorities had breached Article 3 of the European Convention on Human Rights in authorizing the use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink as interrogation techniques in Northern Ireland. Shortly thereafter, the British government suspended existing procedures and set up a committee of inquiry that found the techniques used did not amount to brutality. After criticism of that report, another committee was set up; two of its members found the techniques justifiable in exceptional circumstances, while a third member found the techniques illegal and objectionable. The government then abolished the techniques and subsequently paid substantial compensation to the victims of those interrogation methods. In 1978 the European Court of Human Rights, reversing the Commission's finding of torture, found that the techniques had amounted to inhuman or degrading treatment, but not torture.

When resort was made to administrative detention in 1971, the British government was quick to set up the commission under Lord Diplock to recommend legal procedures to deal with terrorist activities in Northern Ireland. The Commission's report was largely followed in enacting the 1973 EPA. At the same time as juries were suspended, capital punishment was abolished. In 1974 a new committee was formed under Lord Gardiner to consider the whole range of measures used to deal with terrorism in Northern Ireland, with particular regard to the protection of civil liberties and human rights. Its recommendations were incorporated into the 1975 EPA. The 1974 and 1976 PTA were reviewed by Lord Shackleton in 1978 and Lord Jellicoe in 1983. Those recommendations were incorporated in

the 1984 PTA.

In 1977 Amnesty International investigated complaints that suspects were being physically maltreated while in the custody of the Royal Ulster Constabulary ("RUC"). The government immediately set up an independent committee headed by Judge Bennett to investigate RUC interrogation procedures and practices. The report found that some violence had been used during interrogation, and it made several recommendations that were implemented as part of the RUC code of conduct and in the 1984 PTA and the 1984 PCEA. After the measures undertaken in 1971, when the Republic of Ireland filed its complaint with the European Commission, and in 1979, after the Bennett report, charges of maltreatment by police and soldiers in Northern Ireland declined dramatically.

A review of the 1978 EPA was commissioned of Judge Baker in 1983. His report is currently under study for incorporation in a new EPA for Northern Ireland. The Standing Advisory Commission on Human Rights also reported to Parliament in 1977 on the state of protections for human rights under law in Northern Ireland and recommended that a bill of rights be enacted for the entire United Kingdom. The combination of the problems brought to light in practice in Northern Ireland and in the various commissioned reports led to a complete review of English criminal procedure by the Royal Commission on Criminal Procedure, whose suggestions were substantially incorporated in the 1984 PCEA. In addition to the various reports commissioned by Parliament, the operation of the EPA is debated every six months when both Houses vote on whether to continue the Act in force.

Senator Dodd

Q-2. Please provide a discussion of the retroactivity provision in the Supplementary Treaty.

A. The retroactivity provision is consistent with established practice in U.S. extradition treaties, is fully consistent with the U.S. Constitution, and advances important U.S. law enforcement interests.

The United States has entered into supplementary extradition treaties with over 20 nations, and virtually every one of these was made retroactive to the date of entry into force of the original treaty. Several, such as the supplementary treaties with France in 1970 and with Sweden in 1983, contain texts essentially identical to that of Article 4 in the US-UK Supplementary Treaty.

US courts have consistently upheld the retroactive application of extradition treaties. For example, in In Re Burt, 737 F.2d 1477 (7th Cir. 1984), the United States agreed to extradite to the Federal Republic of Germany a U.S. citizen accused of having murdered a person in the Federal Republic in 1965. The extradition occurred pursuant to a US-FRG extradition treaty which contained a retroactivity provision and which had entered into force in 1980. The Court of Appeals for the Seventh Circuit refused to block the extradition even

though the applicable treaty had not become effective until 15 years after the crime. Id. at 1486.

It is also clear that such retroactivity provisions do not violate the ex post facto clause of the Constitution. The Supreme Court has held an ex post facto law to be "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" Weaver v. Graham, 450 U.S. 24, 29 (1981) (citations omitted).

In contrast, Article 4 of the US-UK Supplementary Treaty relates only to acts that were offenses in both countries at the time of their commission. In addition, Article 4 cannot violate the ex post facto clause because it does not make any conduct unlawful. It serves the important purpose, as do all other retroactivity clauses in our extradition treaties, of making improvements in our bilateral extradition relations available for use in a timely, simplified and coherent manner.

Senator Dodd

Q-3. Please provide a discussion of the statute of limitations provision in the Supplementary Treaty.

A. The current US-UK Extradition Treaty provides that extradition shall not be granted if the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested State. Article 2 of The Supplementary Treaty now before the Senate would amend the current treaty so that the law of the requested State concerning statutes of limitation would not serve as a basis for denial of an extradition request.

This proposed change is not related to any particular problems or issues in the US-UK extradition relationship. It reflects the general view of the United States that a person should not be permitted to defeat an otherwise meritorious extradition request by resorting to the laws relating to the statute of limitations of the foreign jurisdiction to which he has fled. The law of the State where he committed his crime should determine whether his prosecution is prohibited by the lapse of time.

This proposed change would be consistent with other recent U.S. extradition treaties, approved by the Senate and ratified by the President, which provide that the statute of limitations

of the requesting State only shall apply. These treaties are:

US-FRG	June 20, 1978
US-Colombia	September 14, 1979
US-Costa Rica (not yet in force)	December 4, 1982
US-Italy	October 13, 1983
US-Jamaica (not yet in force)	June 14, 1983
US-Thailand (not yet in force)	December 14, 1983

Consistent with the policy enunciated above, the statute of limitations provisions in the new treaties with the FRG, Italy and Jamaica represent changes from the previous treaties with those countries. The provisions in the new treaties with Costa Rica and Thailand are effectively the same as in the previous treaties with those countries.

Also, the recent extradition treaty with Ireland, of July 13, 1983, contains no provision on a statute of limitations. In the absence of such a treaty provision, the general rule in the United States is that no limitation of U.S. law is applied to the case during extradition hearings in the United States. Rather, the statute of limitations is a matter to be raised at trial in the requesting State. See 6 Whiteman, Digest of International Law 854; Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963); Freedman v. United States, 437 F.Supp. 1252 (N.D.Ga. 1977).

Senator Dodd

Q-4. Has any Administration ever sought to modify an extradition treaty where a foreign government has changed or its procedures have changed fundamentally?

A. We have found no record of an attempt by this or prior Administrations to modify an extradition treaty because a foreign government has changed. We have amended our extradition treaties with two countries, Norway and Sweden, because of significant developments in their domestic laws; however, we would not characterize those developments as fundamental changes in their procedures within the context of this question.

Formal amendments to a treaty, however, are not the only means available to the United States to guard against the extradition of fugitives from this country in circumstances that raise doubts about the likelihood that they will obtain a fair trial in the country to which they are to be extradited. Where a government or its system of justice has changed fundamentally, in effect the United States has suspended implementation of the treaty. In other cases where the treaty remains operational with respect to extradition for common criminal offenses, the Secretary of State retains the authority and the responsibility to review each case conscientiously, and in his discretion to refuse surrender of a fugitive if he believes that the fugitive would be subjected to an unfair trial or to prosecution for political reasons.

Senator Dodd

Q-5. If the Congress at some future date enacts legislation such as has been reported by this Committee in the past, would that legislation regarding extradition supersede the provisions of this treaty with the United Kingdom?

A. In many respects the Supplementary Treaty addresses the same concerns in a similar manner as prior bills on this subject considered by the Committee, so that it is not evident that there would be any conflict between the treaty and the terms of any subsequent legislation.

Ultimately, of course, it would be up to the courts to determine whether there were such a conflict. If it were determined that such a conflict exists, and Congress had made clear its purpose to override the treaty, then a subsequent Act of Congress would prevail over the prior treaty for the purpose of domestic law, to the extent of the conflict. Reid v. Covert, 354 U.S. 1, 18 (1957).

The Supreme Court has endeavored, however, to interpret Acts of Congress so that they do not conflict with treaty rights, if possible. Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503 (1947). Consequently, to the extent that the courts were to find that the Supplementary Treaty was compatible with any subsequent legislation, e.g., because they found that the legislation did not establish exclusively all of the limits on the political offense exception, the legislation would not be held to override the treaty.

(From the Washington Post, Wednesday, July 31, 1985)

BBC Cancels Documentary

*Network Bows to Government
In Unprecedented Action*

By Karen DeYoung
Washington Post Foreign Service

LONDON, July 30—The board of governors of the British Broadcasting Corp. today canceled a documentary on Northern Ireland, scheduled to be aired next week, after the government asked for its withdrawal on grounds that it was "against the national interest."

The government-appointed board overrode approval of the program by the BBC management, saying it would be "unwise" for it to be "transmitted in its present form." The program, entitled "At the Edge of the Union," includes an interview with a man it says is believed to be chief of staff of the outlawed Irish Republican Army.

The board called for "further discussions" with the government, and Home Secretary Leon Brittan said he would be happy to meet on "the issue of terrorism and the way it is handled on television." Brittan has acknowledged that he has not seen the program, but was relying on "press reports" of its contents.

Both the government's public request and the board's acquiescence were unprecedented in the history of the corporation. Although state-owned, the BBC has prided itself on independence and has a reputation for objectivity. The government's power to stop a BBC broadcast has never been used.

Today's decision provoked an immediate outcry by opposition politicians as well as outside commentators, and expressions of shock from BBC staff members. They charged political interference and censorship, and journalists at the corporation met to consider union action.

Asked tonight if the government had influenced the board's decision, Chairman Stuart Young said, "Categorically no." The program "is not going to be transmitted," Young said in a televised BBC interview, "because the climate is not right . . . and that is vital, and that's what the decision was all about."

The incident marks the first government-media controversy here since Prime Minister Margaret Thatcher two weeks ago, in the wake of the TWA hijacking, called for voluntary media cooperation in limiting coverage of terrorist actions. She said the media encouraged terrorism by publicizing it.

In a previously scheduled live television interview tonight, Thatcher drew a direct parallel between those comments and the Northern Ireland documentary. "I do not believe that any great organization like the BBC should do anything which might be construed as furthering the objectives of the terrorists and I feel extremely strongly about it."

Recounting numerous IRA attacks, Thatcher acknowledged she had not seen the program, but said, "Anything which is shown which seems to help terrorists seems to me to be totally and utterly wrong."

See BBC, A19, Col. 4

BBC Cancels Documentary

BBC, From A17

"We don't censor," Thatcher said. "We never do. We request." But she said she was "very pleased" with the board's response to the government's request, "And I believe that most people will applaud it."

Critics of both the government and the board insisted today, however, that the canceled program was a questionable example of what Thatcher called "terrorist publicity."

Intending to highlight the seemingly irreconcilable differences in the British-ruled province, it features interviews with principals on the two sides of the controversy. One is a hard-line Loyalist, or Protestant supporter of British rule in the troubled province.

The other is Martin McGuinness, allegedly chief of staff of the IRA, the illegal armed wing of the Roman Catholic opposition, and an elected member of the province's assembly.

Responses from Judge Sofaer to questions from Senator Biden

Senator Biden

Q-1. Please provide for the record the number of all extradition requests from the United Kingdom over the last 20 years and the number of times the Justice Department or the State Department believes extradition should have gone forward but was denied.

A. A computer assisted review of country retrievable records dating from 1975 [records dating from 1965 were not readily available] to the present disclosed that since that time the United Kingdom has submitted some 76 extradition requests to the United States. Of those 76, 56 involve cases that are now closed; 20 involve pending cases.

In the vast majority of the closed cases, extradition to the United Kingdom was granted. In two of the closed cases, In Re McMullen and In Re Mackin, extradition was denied on political offense grounds, but in the opinion of the Administration should have been granted.

In two of the pending cases, In re Quinn and In re Doherty, in which extradition to the United Kingdom has been denied on political offense grounds, the United States is currently seeking by appeal to reverse these results.

It must be noted, however, that the significant point here is not the number of decisions in which extradition has been denied in the United States on political offense grounds. Rather, it is that the few cases involved reflect the recent interpretation of the exception by certain federal courts. If the exception, as presently interpreted, continues to be applied, we will experience in future years a great increase in the number of situations in which terrorists seek and are given refuge in the United States.

INTERNATIONAL LEGAL MATERIALS



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COUNCIL OF EUROPE: EUROPEAN CONVENTION ON THE
SUPPRESSION OF TERRORISM*

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members ;

Aware of the growing concern caused by the increase in acts of terrorism ;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment ;

Convinced that extradition is a particularly effective measure for achieving this result,

Have agreed as follows :

Article 1

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives :

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 ;

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 ;

c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents ;

d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention ;

e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons ;

f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2

1. For the purposes of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

*[Reproduced from the provisional edition provided by the Council of Europe.]

[The Committee of Ministers of the Council of Europe adopted the Convention on November 10, 1976. It will be opened for signature and ratification by Member States of the Council of Europe on January 27, 1977.]

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.
3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3

The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 4

For the purposes of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Contracting States, it shall be deemed to be included as such therein.

Article 5

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.
2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Article 8

1. Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may not be refused on the sole

ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.

3. The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 9

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention.

2. It shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 10

1. Any dispute between Contracting States concerning the interpretation or application of this Convention, which has not been settled in the framework of Article 9, paragraph 2, shall, at the request of any Party to the dispute, be referred to arbitration. Each Party shall nominate an arbitrator and the two arbitrators shall nominate a referee. If any Party has not nominated its arbitrator within the three months following the request for arbitration, he shall be nominated at the request of the other Party by the President of the European Court of Human Rights. If the latter should be a national of one of the Parties to the dispute, this duty shall be carried out by the Vice-President of the Court or, if the Vice-President is a national of one of the Parties to the dispute, by the most senior judge of the Court not being a national of one of the Parties to the dispute. The same procedure shall be observed if the arbitrators cannot agree on the choice of referee.

2. The arbitration tribunal shall lay down its own procedure. Its decisions shall be taken by majority vote. Its award shall be final.

Article 11

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.
2. Any State may, when depositing its instrument of ratification, acceptance or approval or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect immediately or at such later date as may be specified in the notification.

Article 13

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including :
 - a. that it created a collective danger to the life, physical integrity or liberty of persons ; or
 - b. that it affected persons foreign to the motives behind it ; or
 - c. that cruel or vicious means have been used in the commission of the offence.
2. Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.
3. A State which has made a reservation in accordance with paragraph 1 of this article may not claim the application of Article 1 by any other State ; it may, however, if its reservation is partial or conditional, claim the application of that article in so far as it has itself accepted it.

Article 14

Any Contracting State may denounce this Convention by means of a written notification addressed to the Secretary General of the Council of Europe. Any such denunciation shall take effect immediately or at such later date as may be specified in the notification.

Article 15

This Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a Member of the Council of Europe.

Article 16

The Secretary General of the Council of Europe shall notify the member States of the Council of :

- a.* any signature ;
- b.* any deposit of an instrument of ratification, acceptance or approval ;
- c.* any date of entry into force of this Convention in accordance with Article 11 thereof ;
- d.* any declaration or notification received in pursuance of the provisions of Article 12 ;
- e.* any reservation made in pursuance of the provisions of Article 13, paragraph 1 ;
- f.* the withdrawal of any reservation effected in pursuance of the provisions of Article 13, paragraph 2 ;
- g.* any notification received in pursuance of Article 14 and the date on which denunciation takes effect ;
- h.* any cessation of the effects of the Convention pursuant to Article 15.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this day of
in English and in French, both
texts being equally authoritative, in a single
copy which shall remain deposited in the
archives of the Council of Europe. The Sec-
retary General of the Council of Europe shall
transmit certified copies to each of the signa-
tory and acceding Parties.

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U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515
Telephone: 202-225-3951

GENERAL COUNSEL
W. CLARE BAKER
STAFF DIRECTOR
GAIL A. CLINE
ASSOCIATE COUNSEL
ALAN F. GIBBY, JR.

July 23, 1985

Honorable Richard G. Lugar
Chairman
Senate Foreign Relations Committee
SD 440
Washington, D.C. 20510

Dear Mr. Chairman:

I understand that the Committee on Foreign Relations has scheduled a hearing on Thursday, August 1, 1985 on the Supplemental Extradition Treaty between the United States and the United Kingdom. As you may know, the House Judiciary Committee, Subcommittee on Crime, which I chair, has held extensive hearings on extradition in both the 97th and 98th Congresses, and has been actively involved in legislation to reform the extradition laws of this country. I am most interested in the provisions of the treaty scheduled for hearing on August 1, and with your concurrence would like very much to testify at that hearing. Unfortunately, the Subcommittee on Crime has scheduled an important hearing on white collar crime that day, and I would be unable to appear at the Senate hearing. If there is a possibility of postponing the hearing until after the August recess, so that I might be able to testify, I would very much appreciate it.

Thank you for your consideration.

Sincerely,

Bic
William J. Hughes
Chairman
Subcommittee on Crime

WJH:vsh

THOMAS J. MANTON
8TH DISTRICT, NEW YORK

COMMITTEES
BANKING, FINANCE AND
URBAN AFFAIRS
MERCHANT MARINE AND FISHERIES
AGING

Congress of the United States
House of Representatives
Washington, DC 20515
July 25, 1985

WASHINGTON OFFICE
327 CARMON HOUSE OFFICE BLDG.
WASHINGTON, DC 20015
(202) 225-3085

DISTRICT OFFICE
48-12 QUEENSBY BOULEVARD
BROOKLYN, NY 11104
(718) 708-1400

RECEIVED
JUL 29 1985
WASHINGTON, D.C.

The Honorable Richard G. Lugar
Chairman
Committee on Foreign Relations
United States Senate
Suite SD-440
Washington, D.C. 20510

Dear Mr. Chairman:

It is my understanding that the Committee on Foreign Affairs has scheduled a hearing for August 1 regarding the ratification of the U.S.-U.K. Supplemental Extradition Treaty, which was signed by the two countries on June 25, 1985. I am deeply concerned about what effect the political offense exception amendment, which is incorporated into the new treaty, will have on freedom of political dissent in this country and abroad. Accordingly, I request that the Committee schedule additional hearings in the Fall after the August recess.

I make this request for two reasons. First, the issue of modifying the political offense exception is an extremely important one, likely to affect not only our diplomatic relations with the U.K., but also any other country with whom we have treaties which incorporate similar provisions. Historically, our nation has never entered into treaties which permit extradition of those individuals who commit political offenses. In addition, the United States has ninety-six other treaties with foreign nations. Do we intend to make a similar amendment to each of those treaties or are these new provisions going to be restricted to our treaty with the United Kingdom?

Second, I am troubled by the manner in which the Administration proceeded in the negotiation and execution of this new treaty. On June 4, 1985, by letter addressed to the Secretary of State (copy enclosed), I made an inquiry regarding this issue. My letter was never responded to. I learned of the treaty signing, not from our government, but from a British Embassy press release delivered on June 26, 1985. At that time telephone requests made by a member of my staff to the State Department for a copy of the new language of the treaty proved unsuccessful. A copy of the new language was delivered to my office only after the pertinent provisions of the treaty had been printed in the Congressional Record.

The Honorable Richard G. Lugar
PAGE 2
July 25, 1985

Given the serious questions this amendment raises, and the Administration's lack of cooperation to date, I believe it is of the utmost importance that all concerned parties be given a full opportunity to testify. I believe that holding a hearing, scheduled for the eve of the August recess, is most inopportune and places the Committee at an extreme disadvantage if this prevents Committee members from receiving testimony from all sectors. The Committee should, at a minimum, wait until after the August recess so that all interested parties can have an opportunity to express their views. Certainly a universal principle of law, which has endured for over one hundred years, deserves close scrutiny and should not be repealed over night.

I appreciate your giving this matter your prompt attention and hope you will grant additional hearings after the August recess.

Sincerely,



Thomas J. Manton
Member of Congress

cc. All Committee Members

TJM:cak

Enclosure

THOMAS J. MANTON
9th District, New York

COMMITTEES
BANKING, FINANCE AND
URBAN AFFAIRS
MERCHANT MARINE AND FISHERIES
AGING

Congress of the United States
House of Representatives
Washington, DC 20515
June 4, 1985

WASHINGTON OFFICE
327 Cannon House Office Bldg
Washington, DC 20515
(202) 225-3000

DISTRICT OFFICE
66-12 Queens Boulevard
Sunnyside, NY 11104
(718) 706-1400

The Honorable George P. Schultz
Secretary of State
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 10520

Dear Secretary Schultz:

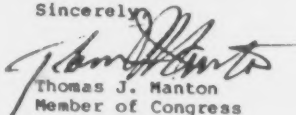
The United States of America and the United Kingdom of Great Britain and Northern Ireland operated under an extradition treaty which entered into force on January 21, 1977. (28 U.S.T. 227, T.I.A.S. 8486). Article V (1)(c) of the treaty sets forth two exceptions to a request for extradition which relate to offenses "of a political character."

In recent years, several individuals have successfully fought extradition to the United Kingdom by availing themselves of the protection offered under Article V (1) (c). These cases have resulted in speculation that the current administration of the two countries will attempt to amend or eliminate this protection.

I have a particular interest in the relationship between the United States and the United Kingdom and the situation in Northern Ireland which gave rise to the cases mentioned above. Accordingly, I am requesting that you respond to the speculation that the extradition treaty will be renegotiated so as to change or eliminate the political offense exceptions. In particular, I wish to know whether or not the two governments are currently negotiating such a change in the extradition treaty, or are planning to negotiate such a change.

A prompt reply would be appreciated.

Sincerely,


Thomas J. Manton
Member of Congress

TJM:cak

MARIO BIAGGI
19th DISTRICT, NEW YORK

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8 SENNARY AVENUE
YONKERS, NY 10704
(914) 378-0800

Congress of the United States
House of Representatives
Washington, DC 20515

July 31, 1985

The Honorable Richard Lugar
Chairman
Senate Foreign Relations Committee
SD-440
Washington, D.C. 20510

Dear Mr. Chairman:

We, the undersigned, are writing to respectfully request that full hearings be conducted on the proposed Supplementary Extradition Treaty signed by the United States and the United Kingdom on June 25, and forwarded to the Senate by President Reagan on July 17.

We are aware that a hearing has been scheduled for August 1. A number of concerns have been raised about this treaty, concerns we share. In that regard, we believe that a full set of hearings are necessary to ensure that these concerns are registered and addressed.

This document is both extraordinary and significant in effect. Its ratification will result in the virtual destruction of the "political offense" exemption that since the 1870's has been a cornerstone of extradition law and treaty in both the United States and the United Kingdom. This treaty is unprecedented in many regards, not the least of which is the fact that it is retroactive upon ratification. The fact that the treaty establishes so many new precedents warrants that it be given full and careful consideration. It is interesting to note that this Supplementary Treaty is being considered within a time period of just over one month. The original Extradition Treaty, signed in London on June 8, 1972, required 4 years to negotiate.

We hope you will give consideration to our views. The need for expanded hearings beyond August 1 becomes evident as more examination of the treaty is undertaken. There are serious legal and political issues associated with this Supplementary Treaty, and we are hopeful they can receive full attention before your distinguished Committee.

Sincerely,

Mario Biaggi
MARIO BIAGGI, M.C.

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THOMAS MANTON, M.C.

Bob Edgar
BOB EDGAR, M.C.

Mike Lowry
MIKE LOWRY, M.C.

Robert A. Mrazek
ROBERT MRAZEK, M.C.

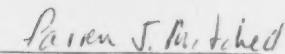
Ronald V. Dellums
RONALD V. DELLUMS, M.C.

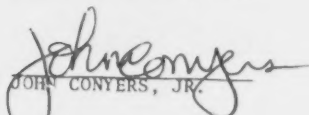
Ben Gilman
BENJAMIN GILMAN, M.C.

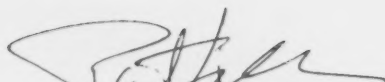
Robert Garcia
ROBERT GARCIA, M.C.

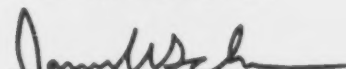
Albert G. Bustanante
ALBERT G. BUSTANANTE, M.C.

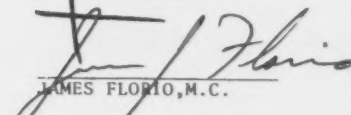

PAUL SIMON, U.S.S.


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Matthew Rinaldo
MATTHEW RINALDO, M.C.

Frank Annunzio
FRANK ANNUNZIO, M.C.

Lane Evans
LANE EVANS, M.C.

William O. Lipinski
WILLIAM O. LIPINSKI, M.C.

JOSEPH J. DIGGUARDI
5TH DISTRICT NEW YORK

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SELECT COMMITTEE ON NARCOTICS
ABUSE AND CONTROL

Congress of the United States
House of Representatives
Washington, DC 20515

REPLY TO:
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1620 LONGWORTH BUILDING
WASHINGTON, DC 20515
(202) 225-8006
DISTRICT OFFICE
1 NORTH BROADWAY, SUITE 901
WHITE PLAINS, NY 10601
(914) 991-6440

Mr. DiGuardi:

Mr. Chairman:

There are two very serious matters which I would bring to the attention of the Senate Foreign Relations Committee in its deliberation of the New Supplemental Extradition Treaty between the United States and the United Kingdom. The first is the matter of the integrity of our judicial system under our Federal Constitutional system of separation of powers and checks and balances. The second is the question of the actual interests of the United States vis-a-vis Ireland and the security of the North Atlantic community.

The proposed New Supplemental Extradition Treaty seems to have as its genesis English reaction to a decision by Judge John E. Sprizzo of the United States District Court in the Southern District of New York on December 12, 1984 in the matter of the requested extradition of Joseph Patrick Thomas Doherty by the Government of the United Kingdom of Great Britain and Northern Ireland. Judge Sprizzo is an old and dear friend of mine and a jurist and former law professor at Fordham University, whose credentials and reputation are above reproach. I ask this committee to read his decision and see clearly that this decision sets no precedent which gives aid or comfort to criminal anarchists or "Red Brigades" or their ilk. What his decision does do is to uphold the political offense exception to extradition in the case of the conflict between the Irish Republican Army and the British occupation forces in those six of the divided Irish Province of Ulster's nine counties known as "Northern Ireland," a regrettable and tragic conflict the political nature of which was recognized by the Nixon Administration State Department. Neither does Judge Sprizzo's decision give any comfort to those who, in a legitimately defined political conflict, exceed the internationally accepted standards of civilized conduct. The truth of the matter is that Judge Sprizzo's decision has upheld our highest traditions of truth and justice. The considerate reading of this decision will take the steam out of the diplomatic hysteria which seeks to substitute the political judgement of the State Department for the impartiality of the Judiciary. Consider also the fate of the so-called Nicaraguan "Contras" and their supporters should a liberal administration come into office in Washington, while the Sandinistas are still in power in Nicaragua. We must not allow the principle of the political offense exception in extradition cases to be replaced with an international political football to be kicked about by the transitory interests of the Foggy Bottom Bureaucracy. In other words do not throw out the baby with the bath water.

In the consideration of this matter many learned opinions were consulted including: the Honorable Andrew Patrick O'Rourke, many of whose writings have appeared in various law journals; Professor Charles Rice, Notre Dame Law School; Nobel Laureate Sean MacBride, S. C., Former Assistant Secretary General of the United Nations and Former Irish Minister for External Affairs, Senator John E. Flynn, Chairman, Irish-Americans Legislators Association; Liam Murphy, Chairman and Mark G. Barrett, Esq., Counsel of my own Foreign Policy Advisory Committee.

I, therefore, introduce the following documents for consideration by the Senate Foreign Relations Committee in deliberation of the New Supplemental Extradition Treaty; and the interests of the United States in Irish Affairs:

- a) Judge Sprizzo's decision in the matter of the requested extradition of Joseph...Doherty...., December 12, 1984
- b) Letter of the Honorable Andrew P. O'Rourke, Westchester County Executive, August 27, 1985
- c) "On American Interests in Ireland" by the Honorable Joseph J. DiGuardi, M. C.

John P. Kilroy

Attorney at Law

120 East 201st Street • Euclid, Ohio 44123

(216) 481-7093

To: The United States Senate Foreign Relations Committee
From: The National Lawyers Guild, Ireland Task Force,
John P. Kilroy, Chairperson
Re: United States--Britain Supplemental Extradition Treaty
Date: September 17, 1985

The National Lawyers Guild, a national legal organization of over 7,000 members, has conducted an intensive and thorough investigation into the operation of the Northern Ireland state. The investigation, which began in 1981, has included a delegation to Northern Ireland which interviewed representatives of 25 different political, governmental, legal and social organizations and institutions representing virtually the entire political spectrum in Northern Ireland. The authors of the National Lawyers Guild report on Northern Ireland have studied the statutory and case law of Northern Ireland and have read a wide range of the available literature on Northern Ireland.

To summarize our basic findings, the National Lawyers Guild concludes that there is an ongoing legitimate political struggle to end British colonialism in Ireland. Any successful solution to the political crisis in Northern Ireland must include a complete British withdrawal and must allow the people of Ireland to control their own destiny. History has shown that neither reforms nor increased repression will solve the crisis in Northern Ireland. They merely perpetuate it.

Now, the United States Senate is asked by President Ronald Reagan to ratify a supplement to its extradition treaty with Britain.

The major thrust of the treaty supplement is to define certain offenses as being not "of a political character." The major propaganda ploy behind the treaty supplement is the use of the phrase "combatting terrorism." Although it appears that the Senate is being asked to combat terrorism, what really is being asked is that the United States help Britain rule part of Ireland.

The Senate must determine, therefore, what should be the United States' foreign policy regarding Ireland and whether the proposed treaty advances those objectives. President George Washington, in his farewell address, advised the nation to keep away from "permanent, entangling alliances" with any of the countries in the Old World. Woodrow Wilson told Congress in 1918, "National aspirations must be respected; peoples may now be governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril."

Are we prepared to admit that these men were either shortsighted or wrong or shall we apply these principles to Ireland and refuse to cooperate with British colonialism?

On the surface, combatting terrorism seems to be a proper role for governments. "Terrorism", however, is a term which has been so overused that it is nearly meaningless. Under British law, terrorism is defined as the use of force or violence for political ends. Therefore, according to Britain, "terrorism" is by its very definition "of a political character." The ratification of a treaty supplement would not and could not change the character of certain acts by Irish men and women who are devoted to the end of British colonialism in Ireland. The ratification would merely

help to extend the life of Britain's dying colonial system in Northern Ireland.

Beginning in March, 1976, those convicted of "terrorist" offenses in Northern Ireland were denied political prisoner status as a matter of law. In 1981, protests against Britain's criminalization policy culminated with a hunger strike during which ten men gave their lives to assert the political character of their acts. With a groundswell of popular support, Bobby Sands was elected to Parliament. Judges and politicians believed that legislation could alter the nature of resistance to British rule in Ireland. The people were not fooled. Now, Britain seeks to export its failed criminalization policy to the United States. We must reject it.

Britain and the United States are often hailed as "guardians of Western Democracy." Will the treaty supplement justify that image or expose it as a myth?

If extradited to Northern Ireland, an accused person would face a legal system which features: denial of bail; denial of right to counsel during interrogation; physical and psychological abuse of the accused; the burden of proof shifted to the accused in regard to firearms and explosives (offenses which are specifically targetted by the treaty); the admissibility of induced confessions; convictions based solely on the testimony of paid informers; and a judiciary with close ties to the Orange Order and British Army. In short, once extradited the accused would have no chance for due process of law.

In Northern Ireland, the elimination of legal safeguards to civil and political rights has been accomplished by the adoption of sweeping special legislation beginning with the Special Powers Act of 1922 and continuing today with the Emergency Provisions Act

and the Prevention of Terrorism Act. In the United States, any attempt to enact such draconian measures would be doomed to failure. The people of the United States would not tolerate such repression. Those who favor expediency over liberty and democracy, however, are succeeding in eroding our civil and political rights step by step. Individual Supreme Court decisions, Executive Orders, statutes, and administrative rulings erode the freedoms enshrined in the Bill of Rights month by month. Now, President Reagan wants to use the treaty supplement as yet another step away from safeguarding the rights of persons living in the United States.

In order to ratify the treaty supplement between the United States and Britain, the Senate should make two determinations. Firstly, the Senate must determine that to use the force of arms to end British colonialism is criminal and secondly, that the legal system in Northern Ireland affords due process of law.

To reach the first conclusion it would not only be necessary to ignore the fact that the creation of the Northern Ireland state was Britain's response to the only democratic all-Ireland election in 1918 in which the people mandated a united Ireland free from British interference, and to ignore the fact that peaceful non-violent protest has been shown to be impossible in Northern Ireland, and to ignore that Margaret Thatcher recently rejected any form of Irish participation in the governance of Northern Ireland but it would also be necessary to repudiate the founders of this country who used the force of arms to end British colonialism and who would be defined as terrorists under British law. To conclude that the Northern Ireland legal system affords due process of law would require the Senate to reject the findings of nearly every

international inquiry into the operation of the Northern Ireland legal system which is quite correctly compared to apartheid.

In closing, the ratification of the proposed treaty supplement would place the United States clearly on the side of the criminal British colonialism in Ireland and at the same time continue the erosion of civil and political rights in the United States. On behalf of the National Lawyers Guild, I urge the Senate to reject the treaty supplement.

John P. Kiley



The Commonwealth of Massachusetts
House of Representatives
State House, Boston

Sept. 10, 1985

Senator John Kerry
Room 392, Russell Building
Washington, D.C. 20510

RE: EXTRADITION TREATY

Dear Senator Kerry:

The following is a statement by State Representative Marie E. Howe, D-Somerville, Mass., and Marion E. McCarthy, of Hull, Mass. It involves our detention for nearly 5-1/2 hours by the Royal Ulster Constabulary and the British Army, on August 12, 1985, while we were touring and visiting friends in Northern Ireland. During this period of detention and interrogation, we were completely denied human and civil rights, and denied access to a phone call to an attorney, or to the American Consular. We were treated in an extremely threatening and intimidating manner, throughout the detention period, and were constantly harrassed and insulted for our being of Irish descent, for our political affiliations in the United States, and our country's democratic system of rights and justice were continuously insulted and ridiculed.

We have been communicating with the office of the American Consular in Belfast, Northern Ireland, who was very concerned and disturbed by our unwarranted detention. He has encouraged us to pursue a civil action suit against the RUC.

On August 12, 1985, we were traveling on the M1 highway, south of Belfast, on our way to tour and visit people in the Republic of Ireland. As we passed Long Kesh Prison in Lisburn, N.I., which is now known as the Maze Prison, Marion McCarthy took about 2 minutes worth of Super 8 film, from the roadway, without stopping the car or getting out of it. About 2 miles further down the highway, we were stopped and forced to pull over by a "Traffic Unit" of the Royal Ulster Constabulary. We were stopped in an isolated area of the road. Immediately after we were stopped, a van pulled up in front of us, and two other vehicles pulled up behind us. All vehicles were unmarked. Out of all vehicles came 14-15 members of the RUC, all with rifles aimed at us. We were asked to provide identification, which we did - U.S. passports and drivers' licenses.

Rep. Marie Howe was driving, and was asked why she had the headlights of the car turned on. She stated that they were on for safety, as part of the road was under construction, and traffic was two-way. It was also an overcast day. Rep. Howe also provided her legislative identification for the state of Mass., which was ignored by the RUC. They then expressed contempt for her political position, and stated that "we don't care who you are, you're in the U.K. now, and have no rights here at all."



The Commonwealth of Massachusetts

House of Representatives

State House, Boston

P. 2

When asked why we were being held and questioned, the RUC stated that they did not have to have any reasons at all, and took all our identification back to their vehicles. They kept our passports and other identification throughout most of the detention period. During this time, the members of the RUC were very insulting and derogatory, and repeatedly told us we had no rights, and threatened us with arrest. They stated that "whatever foolish rights you might have in the U.S., you do not have them here, you're in the U.K." They also stated, in a harsh and degrading manner, "we don't give a damn about the Helsinki agreements, or any agreements with the U.S., they don't matter here".

Marion McCarthy was accused of taking videotape films of Long Kesh. She stated that they were not videotapes, but were films taken with an amateur Super 8 movie camera. The RUC accused her of lying, and threatened her with arrest. The camera was shown to them, but they still insisted that she was lying. When she asked if it was prohibited to take films since there were no signs posted on the road stating this, the RUC agreed finally that it was not prohibited, and there were no signs. We were again told that it did not matter, they could detain and arrest us under the Prevention of Terrorism Act, without any reason or charges stated against us.

At this time, a senior officer stated, "take them to the Maze Prison, and strip-search them and search the car". This also was stated in a derogatory manner, and in a threatening way. We were taken to Long Kesh Prison, which also contains a British Army Base. We were then subjected to intensive, degrading interrogations, separately and together, and every item of our personal belongings was taken and placed on the floor and on tables in a hangar on the base. All belongings and the car we had rented were searched in detail. We were held under armed guard by soldiers of the British Army, while three soldiers took the car apart and searched it. These were in addition to the several members of the RUC, who guarded us with rifles, and two plainclothesmen. A female member of the RUC conducted body searches on each of us, with the male members of the RUC and British Army present. During the entire detention period, we were subjected to insulting, degrading questioning, and statements about us, and our personal belongings. Threats, intimidation, and harassment were continuous.

When stopped on the highway, we had asked if we would be allowed to call an attorney, or the American Consulate, and had been told that we could. When we arrived at the Army base on the prison grounds, the phone call was refused, and we were made fun of because we had believed we would be allowed to call. We repeatedly asked that the American Consulate be called. We were told at 12:30pm that this had been done. We had been detained at 10:50am, and later after our release, we were told that the call did not take place until 2:15pm, by the office of the Consulate. The RUC had deceived us about this, and other issues also.



The Commonwealth of Massachusetts

House of Representatives

State House, Boston

We were not released until 4:10pm, making the detention and interrogation period a total of 5-1/2 hours. When we stated that the period should have been 4 hours, we were again ridiculed, and told that they could keep us as long as they wanted, and could arrest us for even longer, under the PTA. Also, one member of the RUC stated, that his partner would collaborate on whatever time he said we were picked up, indicating that they collaborate with each other's lies when it suits them.

During this period, we were constantly terrorized with threats of arrest, and about the fact that we were isolated, and no one knew where we were. This was true for much of the period. We were asked if we were of Irish descent, and racist comments were made about that. We were asked what political parties we belonged to in the U.S. When we said Democratic, this was ridiculed. We were told that our Constitutional rights were "nonsense", and we did not have any rights at all there.

During this period, we were constantly told that no reasons were needed for our detention. We were never told why we had been stopped, and why we were detained and searched for such a long period of time. We had been touring England and Scotland, in addition to Ireland, and were told we had to give detailed accounts of where we had been, with whom, why we were there, etc., or we would be arrested. Gifts we had purchased were spread out and searched, and every personal letter, postcard, etc., was read. Our itinerary throughout the Republic of Ireland was questioned - where we were going, with whom staying, for how long, etc.

Frequently, the female member of the RUC would take certain items of our belongings and pass them around, with sarcastic comments, to the RUC and British soldiers. We were very disturbed about their continuous mockery of, and contempt for, us as U.S. citizens, as Irish Americans, and the democratic system in the U.S. They mocked our laws and rights and freedoms. They told us about the PTA and other forms of legislation used to oppress the Irish people, and told us that there were no rights, "in the U.K.", and that they had the laws on their side, and "can do whatever we care to do".

Marion McCarthy had asked them if they could call her children collect in the U.S., at 2pm Irish time, 9am U.S. time, as her children were expecting a call at that time. This call was refused, causing the children concern and anxiety, when they finally received the call after her release several hours later.

Frequently, when we answered their questions, we were accused of lying. The entire period of detention and interrogation was degrading and demeaning, and very terrifying, as there were so many of them, we were under armed guard, and the interrogations were constant, with the same questions repeatedly asked.

All films of our tour of England, Scotland, and Ireland were confiscated by the RUC and the British Army.



The Commonwealth of Massachusetts

House of Representatives

State House, Boston

While our detention was a horrible and frightening experience, it was brief, as compared to what is imposed on the Irish people every day of their lives, living in the military police state that is Northern Ireland. The Army and the RUC work hand in hand to operate this police state, with repressive legislation enacted in the British Parliament.

The detention period under the PTA is only the first step in an unjust, discriminatory judicial system that has been condemned and criticized throughout the world by reputable legal, human, and civil rights groups and organizations. This undemocratic, oppressive judicial system is marked with detention and interrogation without legal counsel, and under harsh, brutal conditions; detention on remand, wherein a person can be imprisoned with no charges brought against them, for long periods of time, 2 and 3 years, before an appearance at court; internment without trial, presently used under the Diplock Court system; mass show trials wherein persons are arrested and imprisoned on the word only of a paid British Army-RUC informer. Interrogation methods of the RUC, UDR, and British Army have been condemned by international human and civil rights groups. Long term sentences are imposed on people with no evidence, and based on tortured "confessions". Prisoners are treated in harsh degrading, and inhumane ways. Due process of the law with a concomitant system of justice does not exist in Northern Ireland, and this police state is governed by repressive laws enacted in the British Parliament to destroy the fabric of Irish culture, tradition, and custom, and to dehumanize the Irish nationalist people.

The system of injustices and repressive legislation imposed on the Irish people during the British occupation of the Six Counties of the past 15 years, has resulted in the internment and interrogation of nearly 30,000 Irish nationalists, the murder by the British Army, RUC and UDR, and Loyalist paramilitary groups of nearly 1,000 Irish nationalist men, women, and children; the institution of internment without trial, the use of plastic and rubber bullets, which have resulted in the murders of 7 children and 8 adults, and hundreds of severe injuries; the plastic and rubber bullets have been manufactured and distributed by American companies; the strip searching of men and women prisoners and their families; the use of the informers' "supergrass trials"; and the present imprisonment without due process of 2300 Irish nationalist political prisoners in England, Ireland, and the Six Counties. Irish political prisoners in England are frequently denied family visits, are kept in isolation and solitary for years at a time.

We ask for your sincere consideration of what we have stated here concerning our detention, and the other documented information about the true conditions in Northern Ireland that we have presented here. We ask that you give careful consideration to this information when making decisions regarding the forthcoming supplement to the Extradition Treaty with Great Britain.



The Commonwealth of Massachusetts

House of Representatives

State House, Boston

The systematic injustices perpetrated against the Irish nationalist people is what Irish political prisoners now imprisoned in the U.S. sought refuge from when they fled to this country. It is the deplorable, corrupt system of injustices that these Irish people would be condemned to, should the U.S. honor the British Government's request to further deny human and civil rights through the supplement to the Extradition Treaty now pending. We ask that this statement be accepted and entered into the Congressional hearings to be held Sept. 18, 1985, in Washington, D.C. We urge you to oppose these changes to the Extradition Treaty.

Respectfully Submitted,

Marie E. Howe

State Representative Marie E. Howe
Room 279, State House
Boston, Ma. 02133

Respectfully Submitted,

Marion E. McCarthy

Marion E. McCarthy
170 Manomet Ave.
Hull, Ma. 02045

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF THE REQUESTED	:	
EXTRADITION OF JOSEPH PATRICK	:	
THOMAS DOHERTY BY THE GOVERNMENT	:	83 Cr. Misc. 1,
OF THE UNITED KINGDOM OF GREAT	:	page 26 (JES)
BRITAIN AND NORTHERN IRELAND	:	

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A P P E A R A N C E S:

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Of Counsel

SPRIZZO, D. J.:

Petitioner United States of America, acting on behalf of the United Kingdom of Great Britain and Northern Ireland, has requested the extradition to the United Kingdom of respondent Joseph Patrick Thomas Doherty. This request is made pursuant to 18 U.S.C. § 3184 and the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227, T.I.A.S. No. 8468 (effective Jan. 21, 1977) ("the Treaty"). The Government of the United Kingdom seeks Doherty's extradition on the basis of his conviction in Northern Ireland on June 12, 1981 for murder, attempted murder, and illegal possession of firearms and ammunition, and for offenses allegedly committed in the course of his escape from H.M. Prison, Crumlin Road, Belfast, on June 10, 1981.

Doherty was arrested by the United States Immigration and Naturalization Service on June 18, 1983, in New York City. A provisional warrant of arrest was issued by Chief Judge Constance Baker Motley on June 27, 1983, pursuant to Article VIII of the Treaty. A formal request for extradition was filed in accordance with Article VII of the Treaty in the Southern District of New York on August 16, 1983. A hearing was held by the Court in March and April 1984 pursuant to 18 U.S.C. § 3184.

The facts of this case are not in substantial dispute. The incidents giving rise to the extradition request are

briefly as follows. Respondent Doherty was a member of the Provisional Irish Republican Army ("PIRA"). On May 2, 1980, at the direction of the IRA, Doherty and three others embarked upon an operation "to engage and attack" a convoy of British soldiers. Transcript of Hearing ("Tr.") at 631.

Doherty testified that he and his group took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.

In the exchange of gunfire Captain Herbert Richard Westmacott, a British army captain, was shot and killed. Doherty was arrested, charged with the murder, among other offenses, and held in the Crumlin Road prison pending trial. On June 10, 1981, after the trial was completed but before any decision by the Court, Doherty escaped from the prison along with seven others. He was convicted in absentia on June 12, 1981 of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization.

Pursuant to Article IX of the Treaty, the Court must be satisfied that probable cause exists with respect to the offenses for which the requesting party seeks Doherty's extradition. See Sidona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980). Petitioner produced a Certificate of Conviction for

the offenses related to the death of Captain Westmacott, and a Warrent for Arrest of Doherty with respect to the escape from the Crumlin Road prison. See Request for Extradition. Doherty has not contested that he is, in fact, the person named in those documents, or named as respondent herein. Indeed, he testified as to his involvement in both the May 2, 1980 incident which resulted in the death of Captain Westmacott and the June 10, 1981 prison escape.. See Tr. at 631-45, 654-67. Therefore, the Court finds that probable cause clearly exists.

Doherty asserts that the extradition request must be denied, however, pursuant to Article V(1)(c)(i) of the Treaty, which provides:

(1) Extradition shall not be granted if:

* * *

(c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; . . .

Petitioner denies that this so-called "political offense" exception to the Treaty is applicable in this case. The Court must determine, therefore, whether the offenses for which Doherty was convicted in relation to the May 2, 1980 incident, and those for which he is accused in connection with the escape from prison, are of a political character.

It seems clear, as the evidence established, that the centuries old hatreds and political divisions which were spawned by England's conquest of Ireland in medieval times continue to resist any permanent resolution. Instead they

have smoldered, sometimes during long periods of quiescence, only to repeatedly erupt with tragic consequences. The offenses which give rise to this proceeding are but the latest chapters in that unending epic. See In Re Mackin, 80 Cr. Misc. 1, p. 54 at 49-74 (S.D.N.Y. Aug. 13, 1981), appeal dismissed, 668 F.2d 122 (2d Cir. 1981).

The Provisional Irish Republican Army, of which respondent is a member, claims to be a contemporary protagonist in that ancient struggle. The evidence established that, the Irish Republican Army and more particularly the PIRA, had for a time lost much public support and had indeed become dormant, while other groups, emulating the pattern of civil rights groups in this country, sought to achieve an amelioration of alleged political and economic deprivations by peaceful means. It is indeed unfortunate that those efforts failed, but fail they did. Perhaps, given the long standing enmities, anxieties, and fears that exist between the Unionists and Republicans in Ireland, it was too much to expect that they would succeed. Nevertheless it was the collapse of those peaceful efforts that ironically led to a resurgence of the PIRA.

On January 30, 1972 in Londonderry, what started out as a peaceful demonstration ended in a bloody confrontation in which 13 civilians were killed. See Tr. at 61, 133-34. Since British troops were regarded as at least in part responsible for that tragedy, their presence which had been initially welcomed, became a subject of increasing antipathy and

concern.^{1/} The result was a fresh impetus for the PIRA, and increasing support for those who would resolve Ireland's political problems by violence.^{2/}

Following the resurgence of the PIRA, the level of violence both by the PIRA and armed Loyalist groups continued to escalate in a continuing and seemingly inexorable series of events that between 1972 and 1979 claimed the lives of over 1,770 persons, nearly 1,300 of whom were civilian casualties, and injured hundreds of others. See Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978 (the "Baker Report") (P.Ex. 18) at 152; see also New Ireland Forum, The Cost of Violence arising from the Northern Ireland Crisis since 1969 (R.Ex. UU) at ¶ 2.1. This alarming and at times wanton destruction of life and property necessitated the enactment of special laws, see Northern Ireland (Emergency Provisions) Act 1973 (R.Ex. BB); Prevention of Terrorism (Temporary Provisions) Act 1976 (R.Ex. CC); Northern Ireland (Emergency Provisions) Act 1978 (R.Ex. DD); see also Report of the Commission to consider procedures to deal with terrorist activities in Northern Ireland (the "Diplock Report") (R.Ex. AA); Suppression of Terrorism Act 1978 (P.Ex. 15), including the creation of special Diplock Courts to try political offenders, and transformed the Catholic areas of Belfast and Londonderry into zones of military occupation.

Were the Court persuaded that all that need be shown to sustain the political offense exception is that there be a political conflict and that the offense be committed during

the course of and in furtherance of that struggle, the respondent would clearly be entitled to the benefits of that exception. However, that conclusion is but the beginning and not the end of the analysis that must be made to determine whether in fact Doherty may be properly extradited.

While it is true that some of the older English cases, see, e.g., In re Meunier [1894] 2 Q.B. 415, 419; In re Castioni, [1891] 1 Q.B. 149, 156, 159, 166, and some of the American cases that have relied upon them, see, e.g., In re Mackin, supra, 80 Cr. Misc. 1 at 24-25; In re Gonzalez, 217 F. Supp. 717, 720-21 (S.D.N.Y. 1963); In re Ezeta, 62 F. 972, 999 (N.D.Cal. 1894), have assumed that that is all that need be shown, such an approach is hardly consistent with either the realities of the modern world, or the need to interpret the political offense exception in the light of the lessons of recent history. Nor is it reflective of the more recent English precedents which have, relying upon that experience, adopted a more restrictive view of that exception, see, e.g., Regina v. Governor of Pentonville Prison, Ex parte Cheng [1973] W.L.R. 746, 753; Regina v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556, 591-92, a view shared by at least one American court. See Eain v. Wilkes, 641 F.2d 504, 518-21 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981). But see Karadzole v. Artukovic, 247 F.2d 198, 204-05 (9th Cir. 1957), aff'g, Artukovic v. Boyle, 140 F. Supp. 245 (S.D.Calif. 1956), vacated, 355 U.S. 393 (1958); Quinn v. Robinson, No. C-82-6688 RPA, slip op. at 22-23, 29-32

(N.D.Cal. Oct. 3, 1983), appeal pending, 83-2455 (9th Cir. Oct. 14, 1983); In re McMullen, Magistrate No. 3-78-1099 MG, slip op. at 3 (N.D.Cal. May 11, 1979).

How then is the political exception doctrine to be construed and what factors should limit its scope? Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense. Surely the atrocities at Dachau, Aushwitz, and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been, and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offense. Moreover, it would not be consistent with the policy of this nation as reflected by its participation in those trials, for an American court to shield from extradition a person charged with such crimes.

The Court concludes therefore that a proper construction of the Treaty in accordance with the law and policy of this nation, requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or

in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty. Cf. McGlinchey v. Wren, 3 Ir. L. Rep. Monthly 169 (Irish Sup. Ct. 1982) (political offense exception of Treaty between Northern Ireland and the Republic of Ireland limited by the highest court of the Republic to "what reasonable, civilised people would regard as political activity.")

The Court rejects the notion that the political offense exception is limited to actual armed insurrections or more traditional and overt military hostilities. The lessons of recent history demonstrate that political struggles have been commenced and effectively carried out by armed guerillas long before they were able to mount armies in the field. It is not for the courts, in defining the parameters of the political offense exception, to regard as dispositive factors such as the likelihood that a politically dissident group will succeed, or the ability of that group to effect changes in the government by means other than violence, although concededly such factors may at times be relevant in distinguishing between the common criminal and the political offender.

Nor is the fact that violence is used in itself dispositive.^{3/} Instead the Court must assess the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place.

Considering the offenses for which extradition is sought

in the light of these precepts, the Court is constrained to conclude that the political offense exception clearly encompasses those offenses. We are not faced here with a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal injury, death, and property damage. Such conduct would clearly be well beyond the parameters of what and should properly be regarded as encompassed by the political offense exception to the Treaty. Whatever the precise contours of that elusive concept may be, it was in its inception an outgrowth of the notion that a person should not be persecuted for political beliefs^{4/} and was not designed to protect a person from the consequences of acts that transcend the limits of international law.

Nor is this a case where violence was directed against civilian representatives of the government, where defining the limits of the political offense exception would be far less clear. Similarly, this is not a case where the alleged political conduct was committed in a place other than the territory where political change was to be effected, a circumstance that would in all probability render the political offense exception inapplicable. See, e.g., *Cheng, supra*, [1973] W.L.R. at 752-53, 755-56, 771; *Schtraks, supra*, [1964] A.C. at 591. Finally, the Court is not presented with facts which establish that hostages were killed or injured or where the principles embodied in the Geneva Convention have clearly been violated.

Instead, the facts of this case present the assertion of the political offense exception in its most classic form. The death of Captain Westmacott, while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British Army's response to that action that gave rise to Captain Westmacott's death. Had this conduct occurred during the course of more traditional military hostilities there could be little doubt that it would fall within the political offense exception. The only issue remaining therefore is does the political exception become inapplicable because the PIRA is engaged in a more sporadic and informal mode of warfare.

The Court is not unmindful of the fact that it would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so called political objectives. Therefore it is proper for the Court to consider the nature of an organization, its structure, and its mode of internal discipline, in deciding whether the act of its members can constitute political conduct under an appropriate interpretation of the Treaty.

However, the PIRA, as the evidence showed, while it may be a radical offshoot of the traditional Irish Republican Army, has both an organization, discipline, and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade. Indeed,

as the testimony established, its discipline and command structure operates even after its members are imprisoned and indeed, as Doherty testified, it was at the direction of the PIRA that he escaped and then came to the United States. See Tr. at 650-73, 830; see also In Re Mackin, supra, 80 Cr.Misc. 1 at 78-80.

Given that defined structure, the fact that the PIRA may not be likely to achieve its objectives does not deprive its acts of their political character. This Court cannot, in interpreting the Treaty, make the political exception concept turn upon the Court's assessment of the likelihood of a movement's success. History is replete with examples of political and insurrectionary movements that have succeeded in effecting political changes that were believed to be improbable if not impossible.

The Court is not, however, persuaded by the argument that respondent's offense must or should be regarded as political merely because the United Kingdom has recognized the necessity to enact special legislation and to create special courts to deal with the problems created by the escalating violence between Republicans and Unionists in Northern Ireland. If that were the case, any lawless group could create political status for itself by merely escalating the level of this lawlessness to a point where the government is constrained to deal with it by special remedies.

The Court also specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are

unfair, and that respondent did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. The Court finds the testimony of the Government witnesses as to this issue both credible and persuasive. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard. Nevertheless, the fairness of the administration of justice in those courts does not and cannot deprive respondent's offenses of their essentially political character.^{5/}

Finally, the Court does not accept as dispositive the view expressed by David J. Bentley, Assistant Legal Advisor to the United Kingdom Home Office, which indicates that in England the political offense exception to extradition is now believed to encompass only those situations in which the sovereign has some interest over and above that of enforcing peace and public order in prosecuting an alleged political offender. See Tr. at 1232-33, 1245-53. The fact that a sovereign may be neutral in punishing violent conduct designed to achieve political ends does not in itself transform offenses that would otherwise be clearly political in nature into ordinary common law crimes.

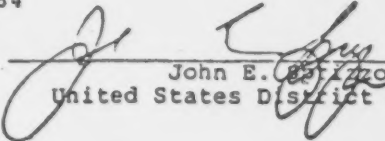
Moreover, were the Court to accept such a view, it would be placed in the delicate situation of having to assess the neutrality and indirectly the good faith of the sovereign

seeking extradition,^{2/} a circumstance that could adversely affect the conduct of foreign relations and might well be inconsistent with the Treaty's structure, which clearly places such determinations in the hands of the Secretary of State. See In re Mackin, 668 F.2d 122, 133-34 (2d Cir. 1981); Eain, supra, 641 F.2d at 513, 516-17. See also Sindona, supra, 619 F.2d at 174-76. That possibility is obviously present here where it is certainly at least arguable that the United Kingdom may not be entirely neutral with respect to the issue of Irish independence because it is the end of British rule in Ireland that has been and continues to be the principal objective of the Irish Republican movement.

In sum, the Court concludes for the reasons given that respondent's participation in the military ambush which resulted in Captain Westmacott's death was an offense political in character. The Court further concludes that his escape from Crumlin Road prison, organized and planned as the evidence established that it was, under the direction of the PIRA and to effect its purposes rather than those of Doherty himself, was also political. That conduct and all of the various and sundry charges which are connected therewith and for which extradition is sought are not extraditable offenses under Article V(1)(c)(1) of the Treaty.^{2/} The request for extradition is therefore denied.

It is SO ORDERED.

Dated: New York, New York
December 12, 1984


John E. Casper
United States District Judge

FOOTNOTES

- 1/ It was clear from the testimony that by August 1969, a state of civil disorder had been reached that had threatened the viability of the Northern Irish government. As a consequence, the Prime Minister requested assistance from the United Kingdom and British troops were sent to maintain order. It is also clear that they were initially well received. See Tr. at 60, 130-31.

- 2/ While the Court is not persuaded that the methods and objectives of the PIRA are in fact shared by a majority of the people in Ireland, or indeed by a majority of the Catholics in Northern Ireland, that circumstance is not dispositive of the issue of whether respondent, as a member of that group, is entitled to rely upon the political offense exception to the Treaty. Indeed, at the time of the American Revolution, there were a large number of colonists who not only desired a continued union with England, but regarded the thought of armed opposition to the Crown as both treasonous and abhorrent. See, e.g., J.R. Alden, The American Revolution 1775-1783 (1954); S.E. Morison, The Oxford History of the American People (1905); C.H. Van Tyne, Loyalists in American Revolution (1902). Many loyalists suffered the consequences of these beliefs both before and after independence. Given the nature of that history it would indeed be anomalous for an American court to conclude that the absence of a political consensus for armed resistance in itself deprives such resistance of its political character.

- 3/ In England the law may indeed be reaching the point where any violent conduct will not be regarded as political when peaceful means are available. See testimony of David J. Bentley, Legal Advisor to the Home Office of the United Kingdom, Tr. at 1270-74.

However, even a recent English case suggests that a political assassination committed in the country where political change is sought to be effected may be protected political conduct. See Cheng, supra, [1973] W.L.R. at 755-56.

- 4/ The concept was first enunciated during an era when there was much concern for and sympathy in England for the cause of liberation for subjugated peoples. See

Schtraks, supra, [1964] A.C. at 582-83; see also Cheng, supra, [1973] W.L.R. at 754-56. Nevertheless, even then there was concern that the term "political offense" should not be defined too precisely or too formalistically lest it unduly restrict proper modes of political conduct or impermissibly sanction every act committed during the cause of a political struggle. In any event, it seems fair to conclude that the Victorian and post-Victorian climate in which the doctrine arose would hardly have been sympathetic to the kind of paramilitary terrorism that has become the plague of the modern age.

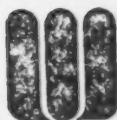
It is also significant that even at an early stage in the development of the political offense exception, the English courts found means to limit the concept by excluding from its definition anarchistic activity directed at all governments in general rather than at a particular regime. See In re Meunier, supra, 2 Q.B. at 419. Some American courts have resorted to a similar rationale, see Eain, supra, 641 F.2d at 521-22. Eain is explicit in recognizing that the best approach may be to balance the policy considerations which underline that exception against those which make it necessary to limit that exception to insure that it does not afford a haven for persons who commit the most heinous atrocities for political ends. See Eain, supra, 641 F.2d at 519-20; see also In re Quinn, Criminal No. CR-81-146-MISC, slip op. at 107-11 (N.D.Cal. Sept. 29, 1982) (Magistrate's Opinion).

5/ It is significant of course that the discretion vested in the prosecution by the emergency legislation to try offenders in the Diplock Courts is indeed exercised on the basis of a determination that what would otherwise be common law offenses are politically motivated. See Northern Ireland (Emergency Provisions) Act 1978 (R.Ex. DD) at §§ 29, 31.-(1), Schedule 4 Notes 1 & 2; Northern Ireland (Emergency Provisions) Act 1973 (R.Ex. BB) at §§ 26.-(1), 28.-(1), Schedule 4 Notes 1 & 2; Diplock Report (R.Ex. AA) at ¶¶ 3-11 & Appendix; Tr. 409, 414-18, 519, 918-20.

6/ The Court is not persuaded by the fact that the current political administration in the United States has strongly denounced terrorist acts and has stated that to refuse extradition in this case might jeopardize foreign relations. See Affidavit of Terrell E. Arnold ¶ 3 (June 14, 1984). The Treaty vests the determination of the limits of the political offense exception in the courts

and therefore reflects a congressional judgment that that decision not be made on the basis of what may be the current view of any one political administration. See, e.g., In re Mackin, 668 F.2d 122, 132-37 (2d Cir. 1981); Eain, supra, 641 F.2d at 513.

- 7/ Of course it is clear that where an offense otherwise political in character is committed for purely personal reasons such as personal vengeance or vindictiveness, that circumstance might well deprive the offense of its political character. In this case there is no suggestion that Doherty had any personal hostility to Captain Westmacott. There is some suggestion that the physical attack upon one of the guards may have had some retaliatory aspects, see R.Ex. Y at 2. However, on balance the Court is persuaded that that guard was assaulted because he sought to prevent the escape.



Westchester County

ANDREW P. O'ROURKE
County Executive

August 27, 1985

The Honorable Joseph DioGuardi, M.C.
1630 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman DioGuardi: *Joe*

The New Supplemental Extradition Treaty between the United States and the United Kingdom is currently before the United States Senate Committee on Foreign Relations. This treaty ought to be a matter of grave concern to all Americans who believe in the rule of law and in the Constitutional principle of separation of powers.

The immediate purpose of this proposed treaty seems to be to overturn the political offense exception, upheld in recent judicial decisions (E.g., U.S. District Judge John Sprizzo in December 1984 found that the case of Joseph Doherty, a member of the Irish Republican Army, presented "the political offense exception in its most classic form," and denied extradition to "Northern Ireland."). The proximate issue may be the continuing Anglo-Irish conflict in those six of the divided Irish Province of Ulster's nine counties known as "Northern Ireland," but the ultimate question involves two heretofore exceptionless norms, principles if you will, of American diplomatic practice (i.e., the political offense exception to extradition) and of Constitutional law (i.e., judicial review).

The political offense exception protects against the use of American courts for the extradition of political fugitives whose alleged "crimes" consist of authentic political dissent or rebellion. It does not cover criminal anarchists, Sikh terrorists, the "Black Liberation Army" or the various so-called "Red Brigades." Neither does it cover any act which violates international law or is inconsistent with international standards of civilized conduct. What it is is an aspect of the humanitarian practice of granting political asylum in deserving cases.

The New Supplemental Extradition Treaty would in effect deny access to the judicial process for political offense extradition cases and instead substitute the political judgement of the State Department. Once the principle is violated in this one instance, the door is then opened to other foreign governments to demand the return of their political dissidents and/or rebels. Will Marcos of the Philippines come asking next, or the Communist Chinese? The same principle protects the Nicaraguan "Contras" and their supporters and protected Benjamin Franklin and John Adams in France during the American Revolution. Once violated, the principle will no longer be inviolate.

I urge you to visit the grave of Thomas Addis Emmett in the churchyard of Saint Paul's Chapel in New York City. Thomas Addis Emmett was a lawyer of international reputation, admitted to the New York Bar by acclamation. He was the first Attorney General of the State of New York. Thomas Addis Emmett was also the brother of the martyred Irish patriot, Robert Emmett, who led an ill-fated rebellion against English rule in Ireland in 1803. Upon learning that a warning had been issued for his arrest, Thomas Addis Emmett escaped to the United States, where he found political asylum. Had the proposed New Supplemental Extradition Treaty been in effect in 1803, Thomas Addis Emmett would have been extraditable to in all probability share his brother's fate of being "hanged, drawn and quartered."

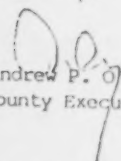
It should be obvious, upon reflection, that any proposal to tamper with the principle of judicial review of political offense extradition cases must not be accepted in haste or in secret, but rather must be fully scrutinized and publicly reviewed before even the consideration of bringing the same to the full Senate. I therefore urge you to insist that the Senate Foreign Relations Committee's hearings on the New Supplemental Extradition Treaty be full and open to the testimony of all interested parties. These hearings must consider the nature of the on-going Anglo-Irish conflict and its current tragic manifestation in "Northern Ireland." The interest of the United States lies in the establishment of political, economic and military/naval stability in a part of the world which lies immediately beside the jugular vein of commerce and communication between North America and the rest of the North Atlantic community. Our foreign policy should actively seek a just and lasting peace for all Ireland and the corollary reconciliation of the "British" and Irish peoples.

Our primary concern must be the preservation of the principle of judicial review of political offense extradition requests.

You have shown an early and a deep interest in Irish affairs and in the welfare of the Irish nation as evidenced in your insightful article, "On American Interests in Ireland." I therefore urge you to offer your own testimony, including the aforesaid article, before the Senate Foreign Relations Committee.

Please do not hesitate to contact me if I can be of any assistance in this matter.

Sincerely,


Andrew P. O'Rourke
County Executive

AOR/WAM

ON AMERICAN INTERESTS IN IRELAND

To many Americans, the tragedy that is in "Northern Ireland" today is little more than an internal British squabble, or at most, a bilateral concern between Dublin and London. In any case, most Americans feel that the "Irish Question" is of no practical concern to the United States. Nothing could be farther from the truth.

The United States has a definite interest in the establishment of a just and lasting peace in Ireland and in the corollary reconciliation of the "British" and Irish peoples. American interests go beyond the fact that we have deep and abiding ties of blood and affection with all parties to the tragic conflict that is in Ireland today. Our interest also lies in the establishment of political, economic and military/naval stability in a part of the world which lies immediately beside the jugular vein of commerce and communication between North America and most of the rest of the North Atlantic community.

The continuing conflict in those six of the divided Irish province of Ulster's nine counties known as "Northern Ireland" costs the United Kingdom in blood treasure and reputation. It costs the North Atlantic Treaty Organization (NATO) in terms of the absence of Ireland (with her proven military manpower and her strategically-located naval and air bases) and its costs in downgraded British participation in the face of the Soviet Threat. Ultimately, through indirectly, it is the American soldier, sailor, airman, Marine and taxpayer who must take up the slack in the maintenance of the defense of the West. (This last point was reinforced by the recent South Atlantic conflict with Argentina).

Since the 1981 Hunger Strikes, interest in the "troubles" in Ireland has increased around the world, especially in the United States; New York City, for example, witnessed months and months of the largest sustained Irish demonstrations and general press and media interest since the early 1920's. It is a matter of public scandal for the entire Western World that Ireland today is witness to political concentration camps. Whether viewed as a question of human rights or of political/military insurgency, and current conflict in the "North" of Ireland is a blot upon the reputation of the United Kingdom and a chink in both the moral and the physical armor of the West.

The American dimension to the centuries-old Anglo-Irish conflict has existed since long before the independence of the United States. There is a significant body of American opinion which believes not only in the moral rectitude of a truly independent Irish Ireland, "not Free merely, but Gaelic as well, not Gaelic merely, but Free as well," but which feels a moral imperative to work through the American political system to seek to hasten the English withdrawal and the reunification of Ireland which are the sine qua non of a just and lasting peace for all of Ireland. It is most significant that the Primate of All Ireland and the previous Taoiseach (Irish Prime Minister) alike have recognized both the legitimacy and the utility of the American dimension.

During the bright decade of the men and women of Easter Week 1916, many Americans have pledged themselves "To aid and advance by all legitimate means the aspirations and endeavors of the Irish people for complete and absolute independence."

Ireland is chronically destabilized by the "British" presence. The on-going conflict in north-east Ireland is not only a growing concern to Irish America, but also a potential threat to the security and stability of the North Atlantic community. Ireland lies astride the sealanes through which Europe and, yes, Great Britain must be reinforced and resupplied in the event of a crisis. We have no less an authority for this strategic judgement than the former Chairman of the NATO Military Committee, Admiral of the Fleet Sir Peter Hill-Norton (No soft Options: The Politico-Military Realities of NATO, 1973).

Nothing that has been tried since 1920 has alleviated the sufferings of the Irish people nor the political instability of Ireland. Partition was the principal cause of Irish "official" neutrality during the Second World War, and Partition has the same effect today. Ireland must achieve national unity with sufficient alacrity to preclude meddling by agents of the other great destabilizer. The reunited Irish people, themselves, are the most secure custodians of their own liberties.

I agree that a change in British policy must be encouraged and I further contend that the ultimate reunification of Ireland is an important element of a just and lasting peace for all Ireland; in the words of Padraic Pearse: "Ireland unfree shall never be at peace."

The United States is currently on friendly terms with all of the principals of this unhappy conflict, most especially with the United Kingdom. A true friend does not encourage error, but rather appeals to the other's better nature.

I shall encourage the Reagan Administration to pursue on behalf of the United States, policies which will persuade the British government that the orderly, phased reunification of a truly independent sovereign Ireland is not only historically and morally just, but is also a matter of enlightened self-interest for the United Kingdom and beneficial to the entire North Atlantic community.

Looking not only to the principle of Liberty, but also to the pragmatic, peaceful means of United States assistance in the achievement of Irish re-unification, I shall join my efforts with those of my friend, Chairman Mario Biaggi, and the Ad Hoc Congressional Committee for Irish Affairs as with any other sincere friends of Ireland in a variety of measures including the amendment of the Foreign Assistance Act of 1961 to authorize economic relief and rehabilitation assistance for Ireland. I shall also continue to consult with County Executive Andrew P. O'Rourke, with Senator John E. Flynn, and with my constituents concerning issues of interest of Irish America.

With the Bicentennial of the American War for Independence still green in our memory, let us not forget that the American debt to the Irish is not less than the debt we redeemed in France in 1917/18 and again in 1944.

20 Beechpark Road,

Foxrock, Dublin 18

3 September 1985

Dear Senator Lugar,

As chairman of the International Lawyers' Inquiry into the Lethal Use of Firearms by the Security Forces in Northern Ireland and president of the Irish Council of Civil Liberties, I would like, through you, to respectfully express to the Honourable members of the Senate Foreign Relations Committee my views on the proposed Supplementary Treaty to amend the Extradition Treaty between the United States and Great Britain.

I am disturbed about this amendment for three main reasons:

1. I regard the tradition of non-extradition of political offenders as an extremely important principle of international law and one which has been instrumental over many years in providing asylum for those resisting oppression and injustice in their own countries. Your country has had a fine record of giving shelter to political fugitives in the past, including many from Ireland.

From the evidence given to the committee by Administration spokesmen this amendment is aimed particularly at fugitive offenders involved in the conflict in Northern Ireland. Without in any way endorsing the activities of the various contending groups there, it is quite clear that there is a political conflict going on in Northern Ireland over the control and governance of that territory. Accordingly many of the activities of the paramilitary groups there, such as attacks upon the security forces, constitute political offences in the classic sense - as indeed your courts have consistently held. To limit the political offence exception to extradition in such clear cut circumstances would, in my opinion, strike a blow at the whole principle of the political exception.

Once a breach is made in the principle then the political exception would be threatened in regard to many other countries as well. The door would have been opened to government to propose restricting the exception in regard to other friendly or democratic states with all the possibility^{that actually} for conflict over differing definitions of democracy. This amendment could open the way to similar agreements with governments as dubious as those in the Philippines or Central America. And if the political exception were jettisoned or diluted by the United States it would certainly lead to its being abandoned by many other countries less concerned with international rights and freedoms.

2. As chairman of the International Lawyers' Committee ^{into} the Lethal Use of Firearms by the Security Forces in Northern Ireland, which reported earlier this year, I am unhappy about the legal system in operation in Northern Ireland. The Honourable members of your committee will already have received copies of our report. In it we make clear our reservations about the system of non-jury courts operating in Northern Ire land and call for a return to jury trial without delay. We make clear our concern about certain statements by members of the judiciary there which create public doubt about the impartiality of the courts and we express our concern about the conduct of certain elements of the security forces.

I could not have confidence that persons returned to Northern Ireland for trial for politically related offences would benefit from all the safeguards which one has a right to expect from due legal process and an impartial judiciary and law enforcement system.

3. It appears the effect of the proposed amendment to the Treaty would be to ~~remove~~ effectively remove from the courts in the United States the power to decide what constitutes a political offence. I would regard this as a most retrograde step. Decision by the courts is a most important safeguard against the determination of political offence pleas being subject to the changing whims and political requirements of different administrations. Your courts have a fine tradition of independence on this question and I have been impressed at the seriousness and thoroughness with which they have addressed recent cases involving fugitives connected with the Northern Ireland conflict. I feel this matter should be left in their capable hands.

All in all I feel that to approve this amendment would be to undermine an important humanitarian principle which your country has done much to help establish internationally.

Thanking you and the Honourable members of your committee for your attention,

Yours sincerely,

Kader Asmal
Kader Asmal,

Dean of Arts (Humanities) and Senior Lecturer in Law,
University of Dublin, Trinity College.

SUPPLEMENTARY TREATY
CONCERNING THE EXTRADITION TREATY
BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND
AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
SIGNED AT LONDON ON 8 JUNE 1982

Study as to the effects of the new Treaty in regard to
political fugitives who may be affected by it

By: Michael Farrell

Historian and Journalist; Author of
"Northern Ireland - The Orange State"
1st Edition 1976; 2nd Edition 1980
"Arming the Protestants" (1983)
"Sheltering the Fugitives" 1985 (an
Extradition book, in the press)

While the Supplementary Treaty does not do away with the "Political Offence Exception Clause" which is included in most Extradition Treaties, it restricts very drastically the scope of its application. Normally, the only exception provided in extradition treaties is in regard to the "murder of a Head of State". In other words, a person may be extradited for the murder of a Head of State even if the motivation is political but not for the murder of a lesser dignitary if the motivation is political.

By Article 1, the new Treaty lists a largeⁱⁱ number of offences that cannot in the future be regarded as "offences of a political character". The first four categories of offences in regard to which "the political exception clause" will not apply are charges relating to what can be termed as "international terrorism". The other eight categories of offences which are also excluded from the protection of the "political exception clause" are offences relating to the possession of firearms, explosives, and other matters that are inherent in insurrectionary situations.

Accordingly, the effect of the Supplementary Treaty will be to deprive Irish Republicans who have been involved in the insurrectionary situation in Ireland of the protection provided by the normal "political exception clause". In the prevailing circumstances and on the basis of statements made by spokesmen for the British Government, it is clear that the whole purpose of the Amending Treaty is to secure the extradition of IRA fugitives from the United States. It will nevertheless establish a precedent in relation to other countries whose Governments are closely linked with the present U.S Administration.

The tradition of not extraditing political fugitives dates back to the American and French revolutions when the new republics recognised the right of all people to resist oppression and were happy to offer shelter to rebels against the aristocratic regimes in Europe. Among those who found refuge in the United States and France were Theobald Wolfe Tone, the leader of the United Irishmen's rebellion in Ireland in 1798, and some of his

America and the Irish revolutionary movement.

In France, Napoleon Bonaparte levied a 4,500,000 franc fine on the German city state of Hamburg because it had handed over another United Irishman leader, James Napper Tandy, to the British. Napoleon eventually secured his release and return to France.

Meanwhile America was giving shelter to more famous Irish rebels, including John Mitchel, Thomas Francis Meagher, and John Boyle O'Reilly who had escaped from imprisonment in Australia, James Stephens who had escaped from an English Jail, and six men who were rescued from Australia in 1876 by the American whaler the 'Catalpa'. Meagher became General in the Union army during the Civil War and then Assistant Governor of Montana and O'Reilly became the editor and owner of the "Boston Pilot" newspaper.

In 1891 the criteria for determining what constituted a political offence were laid down by the English courts in a famous judgement that has been quoted in every subsequent 'political' extradition case in the courts of the common law countries. Angelo Castioni, a Swiss national, living in London, was accused of killing a member of the local administration during an uprising in the Swiss canton of Ticino. (In re Castioni (1891) I.Q.B. 149)

The court laid down two basic conditions for the political exception to apply. There must have been a political uprising and the offence must have been committed in furtherance of that uprising. Castioni fulfilled both conditions and the British Courts refused to extradite him.

It was notable that this was not a revolt against some oriental despot. Switzerland was one of the most democratic countries in the world at the time and friendly with Britain. And Castioni's offence was not that of distributing leaflets or printing subversive literature; it was murder. The British court obviously did not intend that the political exception should be restricted to those accused of non-violent activities -- that it should not apply to friendly democracies.

Three years later the United States courts delivered a similar precedent-setting judgement in the case of Antonio Ezeta, a former Vice-President of El Salvador who was wanted by the new government for acts of violence committed during a civil war in which he and his brother who was President, were overthrown. The court in California's northern district followed the reasoning in the Castioni case and refused to extradite Ezeta. In the Ezeta case the Castioni principle was adopted "by analogy in the American Law" Political crime was defined as;

"Any offence committed in the course of/or
furthering of civil war, insurrection of
political commotion."

(Ezeta 62 F, 978, ND Cal 1894, the political
offence Exception by Van den Wijngaert (1980) p. 116)

Since then the political offence exception has become an almost universally accepted practice in international law and it has played an important part in the struggle for self-determination in many countries during this century, enabling rebel leaders - often the future rulers of their countries - to find refuge and shelter from their oppressors.

Many Irish leaders fleeing from the British early this century found shelter and welcome in America. The most famous were Liam Mellows, leader of the 1916 Rebellion in Connacht, who would have been shot if he had been found in Ireland, and Eamon deValera who had escaped from an English jail. At the close of the 1930's the leaders of the Spanish Republic found shelter in France and Mexico after the triumph of Franco in their country. The leaders of the Algerian insurrection in the 1950's found shelter in Tunisia and Egypt and the current rulers of Zimbabwe sheltered in Tanzania and Zambia during their struggle in the 1970's.

.../.

Fugitives from many Latin American dictatorships have also found refuge in the United States over the years. Recently opponents of the governments in the Philippines and South Korea, such as former Filipino Senators, Benigno Aquino, Jovito Salonga and Raul Manglapus and Korean leader Kim Dae Jung have sheltered in America. The murder of Benigno Aquino when he returned voluntarily to the Philippines in 1983, showed that many political exiles fear about their fate should they be sent home are well founded. The other Filipino leaders and Kim Jae Jung have since returned safely to their countries, but only because they were the focus of much international publicity. There are also many humbler people who have fled to the United States because they have resisted oppression or fought for self-determination in their own countries.

The proposed amendment to the Anglo-American Extradition Treaty threatens these people. The Administration says it is aimed solely at relations with Britain where special standards apply because Britain is a friendly democracy subject to the rule of law, and there is no justification for the use of violence there.

But if the political exception is to be abolished for one friendly democratic country, why not for another? And who is to decide which countries qualify as democracies? It could be a short step to abolishing the political exception for fugitives from the Philippines, South Korea, El Salvador, Guatemala, and Turkey. All of these countries have held elections of some sort recently and all are friendly with the present United States Administration. Indeed the Administration did seek to have the political exception removed from an extradition treaty with the Philippines last year but did not succeed.

Abolishing the political exception clause for countries which are favoured by a current Administration or Senate majority could have awkward consequences. A different Administration

.../...

or Senate majority could take a radically different view of some regimes and seek to change the list. And inclusion on the favoured country list could become a matter of prestige for some governments which might seek to use commercial pressures, or negotiations on the leasing of bases, to press for their inclusion.

It could also be an invidious task for the President or Secretary of State to have to explain why one country might be considered democratic enough to warrant dropping "the political exception Clause" but its neighbour which might have a strongly pro-American government might not.

The same applies to the question of excluding violent actions from qualifying for the political exception in certain countries. There already are international conventions which provide that aircraft hijacking, attacks on diplomats, genocide and torture are not to be regarded as political offences no matter what country they occur in. But to rule that the use of force against state security forces or clearly political targets can be regarded as a political offence in one country and not in another could place a U.S. Administration in more embarrassing situations. It is generally provided that "the political exception clause" does not apply to the assassination of a Head of State.

If, for example, it was decided that the use of violence in El Salvador could not be regarded as political but the position was left unchanged in regard to Guatemala, how could that be explained? Or, if the use of violence was regarded as non-political in both countries, how could officials explain that the activities of the "Contras" in Nicaragua were to be regarded as political.

It was precisely to avoid this type of anomaly and the serious injustices it could cause that it was originally decided to make the political exception standard in all treaties and leave it to an independent judiciary to decide which offences qualified for the protection of the treaty.

In some cases persons who have been extradited have been deprived of all rights to a fair trial, or tortured or summarily executed. A case in point was the case of Lieutenant Colonel Anekrane, of the Moroccan Air Force, who after an up-rising in Morocco arrived in Gibraltar in search of political asylum: he was refused asylum and extradited to Morocco on 17 August 1972 and subsequently tried by a court martial and executed on 13 January 1973. His widow and two children brought proceedings against Great Britain by way of Application to the Commission of Human Rights of the Council of Europe. After a preliminary hearing the Government of the United Kingdom agreed to make an ex gratia payment of £37,500 to the Widow. (Anekrane V United Kingdom Application No. 5961/72)

The American courts have, of course, dealt with a number of cases recently where persons sought by the British Government have pleaded that the offences concerned were political. After rigorous examination four separate U.S. courts have held that a political uprising or insurrection is taking place in Northern Ireland and that attacks on members of the security forces or of the political establishment carried out by the IRA are in furtherance of that uprising and therefore qualify as political offences.

In the latest case, that of Joseph Doherty, Judge John Sprizzo in New York's Southern District court held that Doherty's offence - shooting a British soldier in a gun-battle presented "the assertion of the political offence exception in its most classic form." In the circumstances, the Administrations desire to change the Extradition Treaty smacks strongly of changing the law because it does not like the way the courts have interpreted the existed law.

With regard to the specific question of Northern Ireland, there are further good reasons for not breaking with time-honoured tradition of the political exception. Britain may well be a

.../...

democracy, but is Northern Ireland? This "State" or "Province" was established against the wishes of the majority of the Irish people and the Constitution of the Republic of Ireland claims sovereignty over it. For over 50 years, until the local parliament was abolished in 1971 it was a one-party state and the nationalist minority was oppressed and discriminated against.

It is not disputed by any serious historian that the current campaign of violence by the IRA is a product of the treatment of the nationalist minority. Today there are armed troops in the streets in Northern Ireland and it is governed under emergency legislation which inter alia abolishes trial by jury. The security forces have repeatedly been condemned by bodies like the European Court of Human Rights, Amnesty International and British government appointed commissions of enquiry for maltreating suspects. A recent international lawyer's enquiry found that at least 155 unarmed civilians had been killed by the security forces since 1969 (See "Shoot to Kill" International Lawyers Inquiry, 1985 Mercier Press). And the government of the Republic of Ireland has frequently complained about brutal and partisan conduct by these forces.

There is clearly a political conflict going on in Northern Ireland, fuelled to a considerable degree by the overt and covert conduct of the British security forces there. This raises two questions for Americans, those of fair trial and neutrality. Can an alleged IRA member be expected to receive a fair trial if returned to Northern Ireland? And should this not be a matter of serious concern to American legislators.

And if the United States agrees to extradite Irish Republican fugitives to the United Kingdom, is it not effectively intervening in the conflict on the British side? There is no suggestion, for instance, that British soldiers or secret service agents who have killed civilians in Northern Ireland and who enter the United States should be extradited to the Irish Republic to face trial for killing Irish citizens

.../...

(Inhabitants of Northern Ireland are entitled by Irish Law to citizenship of the Republic)

To refuse to extradite, on the other hand, does not imply approval of the extraditee's alleged actions. It is quite possible to oppose the actions of a guerrilla group in a given Country and yet to acknowledge that they are politically motivated and therefore non-extraditable. The American government can make its disapproval of the IRA clearly understood and can enforce the domestic law of the United States without abolishing the 'political exception clauses'. In fact that is exactly what previous Administrations did do.

No Bill or treaty can ever stand completely on its own without wider implications or effects. At a minimum this amendment would set a precedent for other treaties. Speaking to the American Bar Association in London in July, British Home Secretary Leon Brittan urged other countries to follow the trend of the Anglo-American agreement in abolishing or restricting the political exception.

This amendment cannot be confined to Britain and Northern Ireland. It is bound, if passed, to weaken America's commitment to the concept of the political offence and so undermine the position of Latin American or Asian fugitives as well. And the lack of concern for the fate of political dissidents indicated by the amendment would bode ill for the thousands of Latin American and Caribbean refugees who have fled to the United States without any definite charges against them but who are fearful of the attentions of the death squads if they are sent back.

To ratify this amendment would do the United States no measurable good, but it would damage the country's proud tradition of offering asylum to political exiles. Not to ratify it might annoy Mrs Thatcher's government in London, but her government by its intransigent policies in Northern Ireland, has contributed greatly to the growing political support for Sinn Fein, the political party associated with IRA.

Mrs Thatcher's government appears to regard the Northern Ireland conflict as primarily a security problem rather than a political one to be solved by repression rather than concession. Hence her excessive concern with extradition. To ratify the amendment to the treaty would be to encourage her in that belief instead of indicating to her that major concessions by Britain are necessary to prevent the situation getting considerably worse, never mind resolving it. Britain's attempt to dominate or exercise sovereignty over Ireland has lasted several centuries and has been violently resisted by Ireland through the centuries.

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Articles 1, 2, 3, 4, and 5.

221 E. 235 Street

Brown. N.Y. 10470

September 11, 1985
(212) 994-4501

Dear Prof. Rice,

Here is the letter from my Uncle,
Sam P. O'Reilly. He just came back
from his brother's funeral in Dublin and
was not quite up to snuff. He is now
the last of his family.

He was not up to writing as much
as he dictated, so I filled in as
Secretary & he signed the letter.

I hope this is what you need.
Hope to be in Washington on Wednesday.

My love to my map,
Máire ní holt leis 4:10 p.m.
Mary Holt Moore.

September 11, 1985

To The Members of
The Senate Foreign Relations Committee,
Gentlemen,

My name is Samuel P. O'Reilly.
I was born in Dublin City on January 19, 1894.
I was educated in the O'Connell Street School
in Dublin and went to College in Fermoy,
Co. Cork.

I was a member of the First Battalion
of the Dublin Brigade and of the Irish
Republican Brotherhood and took a very active
part in Ireland's struggle for freedom in 1916.
I was an engineer working on the Midland
Railroad and Edward Daly who was Commandant
of the First Battalion, Dublin Brigade requested
me to stop all trains coming in from the main
British base in Athlone. As a result, I blocked
the advance of the English troops from England
into Dublin and Ireland. There were 80
barracks all over Ireland. I fought beside

Padraic Pearse in the G. P. O. and after fire destroyed the building, I continued fighting in Henry Street and Moore Lane. James Connolly was injured in Abbey Street. The British Empire at that time controlled this part of the world. We were a dedicated handful of men fighting for our Country's freedom. British might won out over Irish right and we surrendered. I was sent to Knotsford Prison in Manchester, England and after being there for 4 months, I was sent to Fungoch Prison in the mountains of Wales. I was released at the end of the year of 1916. I returned home to Dublin and Ireland's struggle for freedom. At the time England threatened to put conscription into Ireland and drove Irishmen into the Irish army.

When the truce was declared, I went to sea and then to America. I have lived in America 62 years. I was employed as an engineer by Columbia University for

over 20 years. During World War II,
I served in C. Co., National Guard until
the war ended and I went to sea. After
this I worked until retirement for the
Columbia University Real Estate Department.

I am shocked at this proposed
United States-United Kingdom Extradition
Treaty. I am opposed to this Treaty because
its ultimate result would be to jeopardize
the lives and safety of men and women who have
had the courage to fight for freedom against
injustice, degradation, oppression and murder.

Samuel F. O'Reilly

36 Parkway Blvd.
Lake Ronkonkoma
Long Island, N.Y.
1-516-588-0150

Perspective

A forum—ideas, analysis, opinion

Section 1 13

Chicago Tribune, Tuesday, June 18, 1985

Ulster's untenable status quo

By Raymond L. Flynn

The relative success in the recent Northern Ireland elections of Provisional Sinn Fein, the political wing of the IRA, and the subsequent efforts by the British government to downplay those results demonstrate that time may not be on the side of the forces of moderation. The status quo Britain seeks to maintain in that northeastern section of Ireland has become increasingly untenable.

British attempts to minimize the Sinn Fein vote aside, the fact that some 40 percent of Northern Ireland's Nationalists (Catholics) saw fit to cast their votes for a party committed to "the ballot box and the armalite rifle" underscores all too graphically the increasing alienation of the Catholic population. That alienation has been brought about directly by years of institutionalized discrimination. It is spurred on by an increase in the number of shooting deaths of unarmed Catholics by British security forces during the last year and the continuance by Britain of a nonjury criminal trial system—a feature found in virtually no other Western democracy. All of this runs counter to the notion of a rule-of-law system based on respect for human rights, and has contributed greatly to the level of political violence.

Unless concrete progress is made by year's end in the Anglo-Irish talks over the future of Northern Ireland, the best chance in 64 years for a lasting solution will have been wasted.

But now, some seven months since the agenda for peace outlined by the four Irish constitutional parties was summarily rejected by Prime Minister Margaret Thatcher, it would appear that nothing the Irish government or the representatives of the Nationalist community has said has made an impact on British thinking.

Against this backdrop of British official intransigence, and the escalated paramilitary campaign of the Irish Republican Army, we are compelled to hear the words of William Butler Yeats:

"Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world."

The low priority the British parliamentary parties have assigned to the Northern Ireland problem was vividly demonstrated at the end of last year. When debate in the House of Commons focused on the New

Ireland Forum, only 12 members of Parliament were present throughout, out of a total of 635. The New Ireland Forum is the most hopeful proposal yet for the creation of a pluralistic, nonsectarian society throughout Ireland that recognizes the legitimate rights of the majority of the Irish people to a unified nation.

In addition to the recent unsettling election results, the future is further dimmed by the reality of the devastating effects of violence in Northern Ireland, both paramilitary and official. For despite British contentions that the number of violent incidents has declined, the nature of the violence has changed to such an extent that the number of deaths per incident is rising alarmingly.

As the Report of the New Ireland Forum noted, the violent deaths of more than 2,400 people in Northern Ireland since 1969, in an area with a population of 1.5 million, would be equivalent to 350,000 deaths in the United States.

Furthermore, the killing of 14 unarmed Catholics by British security forces last year, and the deaths of more than 20 police and security force members this year at the hands of the IRA do not add up to the comforting picture of declining violence, greater social stability and the success of a policy of containment British authorities would have others believe.

But the persistence of the Northern Ireland problem underscores that heightened security efforts are not the solution. And any agreement between the British and Irish governments focusing solely on a strengthening of cross-border security arrangements ignores this fundamental reality: It is the existence of that artificial border, which has divided Ireland against the wishes of the majority of the Irish people for the last 64 years, that continues to be the overriding source of conflict.

It is as much in the interest of the British as it is for the Irish to finally ensure that Ireland is allowed to become a society free of foreign coercion, in which the human rights of all will be respected.

The British writer G.K. Chesterton left his people a profound message on the matter of his country's dealings with Ireland:

"Whatever we [English] decide to give to Ireland, we must give it; it is now worse than useless to promise it. I will say here . . . that over all those hills and valleys [of Ireland] our word is wind, and our bond is waste paper."

One hopes that in the eyes of history and her own people, Britain soon will realize the need to put this unfortunate legacy behind her.

Raymond L. Flynn is mayor of Boston.

Fri., Aug. 23, 1985

ST. LOUIS

DISPATCH

commentary

Religious Apartheid In Northern Ireland

U.S. Companies Doing Business There Should Fight Anti-Catholic Job Bias

By Raymond L. Flynn

The surest way Americans of good will can undermine the men of violence in Northern Ireland is to support efforts aimed at establishing economic justice in that British-occupied part of Ireland. Since the U.S. is the single largest investor in Northern Ireland, our country is in a position to seek equality and justice in a manner far greater than well-meaning rhetoric.

Discrimination in employment and a one-sided judiciary have long served as counter-weights for the delicately balanced sectarian stockade that Northern Ireland has been since its creation by Britain 64 years ago. These injustices represent a somewhat more subtle form of violence to that of the terrorists but their effect has also been devastating since they serve as an ongoing source of Catholic alienation. But there is still a positive role Americans of good will and our government can play in getting at the causes of injustice in Northern Ireland. The need for those efforts is heightened by the British governmental intransigence demonstrated by Prime Minister Thatcher's refusal to recognize the need for a solution based on fundamental change in the structure of Northern Ireland itself.

There are currently 24 U.S. companies doing business in Northern Ireland. Of those 24 firms, only eight are located in areas with a majority Catholic population. The combined total of U.S. investments in Northern Ireland, such as the holdings of state governments, universities and pension funds, amounts to more than \$29 billion.

In a study submitted to the U.S. Congress by a nationalist civil rights group in 1981, the overall results of anti-Catholic discrimination in the manufacturing sector of Ulster's economy showed that the work force was 73 percent Protestant and 19 percent Catholic, despite an actual population ratio that is 60 percent Protestant and 40 percent Catholic.

At the Ford Motor plant in Belfast, the only category in the unskilled work force where Catholics currently outnumber Protestants is in the janitorial area.

Fortunately, unlike South Africa, the end to economic discrimination in Northern Ireland can be achieved short of divestment. Indeed, in an economy where both Catholic and Protestant workers have suffered from the consequence of Britain's failed policies in that part of Ireland, with the burden falling heaviest on Catholics, more American business investment will be needed. But

asked to adhere to by the McBride Principles are:

► Increasing the representation of individuals from under-represented religious groups in the work force from managerial positions to technical jobs;

► All job openings should be publicly advertised, along with special recruitment efforts made to attract applicants from under-represented religious groups;

► Layoff, recall and termination procedures should not in practice favor particular religious groupings;

► The banning of provocative sectarian or political emblems from the work place.

The four sponsors of the McBride Principles are individuals dedicated to the peaceful resolution of the Northern Ireland conflict as well as committed to ending anti-Catholic discrimination. Foremost among them is the international human rights advocate, Sean McBride, the first chairman of Amnesty International.

The sponsorship of two prominent Ulster Protestants — Inez McCormack, the Belfast labor leader and former director of the British government's Fair Employment Agency, and Dr. John Robb, a prominent Northern Ireland surgeon and former member of the Irish Senate — also add greatly to the weight of these anti-religious discrimination principles. The support, as well, of Father Brian Brady of St. Joseph's College, Belfast, a civil rights advocate long committed to peaceful attainment of human rights by Ulster Catholics, is also noteworthy.

It is indeed the business of American firms in Northern Ireland and the Americans who invest in those firms not to accept the institutionalized discrimination that is part of the fabric of Northern Ireland. Keeping faith with our own heritage and commitment to human rights demands no less.

Raymond L. Flynn is mayor of Boston.



American investment in Northern Ireland can and should operate in a fashion that will not support discrimination in jobs on the basis of religion.

A far-reaching code of standards known as the McBride Principles — modeled on the Sullivan Principles, which continue as a corporate code of conduct for American companies doing business in South Africa — serve as a useful tool in the effort for economic justice in Northern Ireland. Among the key stipulations in which American firms investing in Northern Ireland are

The Boston Globe

TUESDAY, JULY 23, 1983

Toward economic justice in Ulster

RAYMOND L. FLYNN

The surest way Americans of good will can undermine the men of violence on all sides in Northern Ireland is to support efforts aimed at establishing economic justice in that British-occupied part of the country.

Since the United States is the single largest foreign investor in Northern Ireland, our country is in a position to seek equality and justice, rather than rely merely on well-meaning rhetoric.

Discrimination in employment and a one-sided judiciary have for long served to prop up the state created by Britain 64 years ago. These injustices are a more subtle form of violence than that of the terrorists, but their impact has been devastating because they are an ongoing source of Catholic alienation.

Twenty four US companies are doing business in Northern Ireland. Of those 24 firms only eight are located in areas west of the Bann River, where there is a majority Catholic population. The total American investment in US companies doing business in Northern Ireland amounts to over \$29 billion.

A study submitted to the US Congress by a nationalist civil rights group in 1981 showed that 73 percent of manufacturing workers in Northern Ireland listed themselves as Protestant and 19 percent as Catholic, despite an actual population ratio of 60 percent Protestant and 40 percent Catholic. The others in the survey did not list their denomination.

That anti-Catholic discrimination is continuing was confirmed again last month, this time by the record of a British-owned firm. Short Brothers of Belfast. Despite commitments made by the British government to US officials that more Catholics would be hired in exchange for a US Air Force contract with the Short Company, the

proportion of Catholics has fallen from 17 to 14 percent.

Fortunately, unlike South Africa, the end to economic discrimination in Northern Ireland can be achieved short of a call for divestment.

A far-reaching code of standards known as the McBride Principles - modeled on the Sullivan Principles, a corporate code of conduct for American companies in South Africa - serves as a useful tool in the effort for economic justice in Northern Ireland.

US companies investing in Northern Ireland are being asked to adhere to the McBride Principles. They include these key stipulations:

US companies investing in Northern Ireland are being asked to adhere to the McBride Principles - modeled on the Sullivan Principles, a corporate code of conduct for US companies in South Africa.

- Increasing the representation of individuals from under-represented religious groups in the workforce in managerial positions and technical jobs.

- All job openings should be publicly advertised, along with special recruitment efforts made to attract applicants from under-represented religious groups.

- Layoff, recall and termination procedures should not favor particular religious groupings.

- Provocative sectarian or political emblems should be banned from the workplace.

The four sponsors of the McBride Principles are dedicated to the peaceful resolution of the Northern Ireland conflict and to the end of anti-Catholic discrimination.

Foremost among them is the international human rights advocate, Sean McBride, founder and first chairman of Amnesty International.

Also among the sponsors are two Protestants from Ulster, Ines McCormack, Belfast labor leader and former director of the British government's Fair Employment Agency (FEA), and Dr. John Robb, prominent Northern Ireland surgeon and former member of the Irish Senate.

The fourth sponsor is Rev. Brian Brady of St. Joseph's College, Belfast, a civil rights advocate long committed to peaceful attainment of human rights by Northern Ireland Catholics.

A bill supporting the McBride Principles is before the Massachusetts Legislature. A federal version is to be introduced in Congress soon.

The obligation of US companies to pursue fair employment practices in Northern Ireland was pointed out by Ines McCormack in Boston last month: "If American investment coming into Northern Ireland is not prepared to agree to affirmative action programs which are basic requirements for their practice in the United States, then they can only be on the hunt for cheap labor and the fast buck."

It is indeed the business of American firms in Northern Ireland, and Americans at home who invest in those firms, not to accept the institutionalized discrimination that is part of the fabric of Ulster.

Keeping faith with our own heritage and commitment to human rights requires no less. Above all, justice demands it.

Raymond L. Flynn is mayor of Boston.

Peace with justice, not more rhetoric, needed in Northern Ireland

RAYMOND L. FLYNN

At home and abroad, the absence of effective policy often makes way for hollow rhetoric.

British Prime Minister Margaret Thatcher's recent remarks before a joint meeting of Congress on the situation in Northern Ireland underscore that her government is still more committed to rhetoric than to action for a lasting and peaceful solution to the Anglo-Irish problem.

As in the case of her rejection last year of the three peace proposals offered by the four constitutional parties in the report of the New Ireland Forum, Thatcher made it clear that the British government remains content with an unchangeable status quo that serves neither the interest of Britain nor Ireland.

By simply restating British opposition to the gunmen of the IRA, Thatcher conveniently ignored

the real issue that remains the cause of the violence in Northern Ireland and which even the elimination of the IRA would not solve — the need for her government to end the human rights violations that have characterized the way Britain has run Northern Ireland for the past 63 years.

Discrimination and coercion remain as the counterweights that support the delicately balanced sectarian stockade known as Northern Ireland. Since the 1978 findings of the European Commission of Human Rights, which exposed and condemned the British torture of Catholic prisoners, and the unforgettable slaying of 13 unarmed civil-rights marchers by the British Army in Derry in 1972, there is evidence that continued British repression remains the source of Catholic alienation.

The 14 killings in 1984 by the British security forces of unarmed Catholics, of which only a small

minority were wanted by the police for questioning, suggest that a fringe of official terror and violence, unspoken of by Thatcher, continues in Northern Ireland.

In a society where economic stagnation is the rule, unemployment among Catholics is significantly higher than among Protestants due to the concentration of more major industries in Protestant areas.

While British policymakers may be convinced that the violence can be held at an acceptable level, the institutionalized violence they support is a major obstacle to peace. The recent terrible increase in violence in Northern Ireland underscores that while the social, political and human price of Britain's failed policy climbs higher, it does not purchase a lasting solution.

Before Congress, Thatcher spoke of shared Anglo-American respect "for the principle of non-sect enshrined in your Constitu-

tion and an essential part of ours" as the basis for the continued guarantee of the British link to Northern Ireland Protestants. The real question of majority rule that the British government still ignores is the right of the majority of all the people of Ireland to self-determination.

The Irish people never voted for the division of their country. For 63 years we have seen that the arbitrary partition of Ireland by Britain has been a failure that has led to a continued state of violence.

The status quo in Northern Ireland serves no one. The nationalist population grows more alienated and hostile to British policy. The increasing polarization of the loyalist population, which has benefited over their nationalist counterparts in employment and other areas through the British guarantee, little incentive to join with the rest of the Irish people in building an Ireland that will sur-

mon the talents of all of her children.

Two counties in Northern Ireland — Fermanagh and Tyrone — have Catholic majorities by substantial margins, yet only by force do they remain part of Britain.

As a friend of Ireland and Britain, there is a constructive role our nation can play on the road to peace with justice for Northern Ireland and the creation of a society finally based on the rule of law.

Central to these efforts should be:

1. The appointment by the United States of a special envoy to promote peace.
2. Encouragement by the US government for Britain to issue a declaration of intent to withdraw from Northern Ireland over a period of 20 years, thereby respecting the wishes of the majority of the Irish people to unify Ireland and ending Northern Ireland Protestants with a necessary period of transition.
3. Support by the United States

of an interim period of joint authority in Northern Ireland by the Irish and British governments to allow the Catholic population of Northern Ireland to have the benefit of a security force it would not consider an enemy.

4. US encouragement of the Irish and British governments to establish a final political framework wherein the traditions of all Irish people would be protected, with the decision of a federated or unitary system to be left to the Irish people themselves to decide.

5. A commitment by the United States to wide economic assistance to a unified Ireland.

Clearly it's time to give peace throughout Ireland a real chance, devoid of the sanctimonious rhetoric, and for Britain and Ireland to face the final chapter in a conflict that has needlessly cost far too many innocent lives on both sides.

Raymond L. Flynn is mayor of Boston.

Herold 5/20/84 Sun.

Report offers opening for peace in Ireland

THE IRISH have been dying for their country for 800 years.

It's time to give them a chance to live for it.

The recent report of the New Ireland Forum offers the Irish, British and U.S. governments an opening to help the Irish achieve the peace for which they have long yearned. The report serves two very valuable purposes in the effort to settle the conflict in the North of Ireland. It offers us a description of the problem and it offers the basis for solving it.

The tragedy of decades of failed policy in Northern Ireland is summarized by one tragic fact: since 1969, 2,300 men, women and children have been killed in the conflict. Eighteen of the children were killed by "rubber bullets" fired by soldiers. As the report states, those deaths, in an area with a population of 1.5 million, are proportionally equivalent to 330,000 deaths in the United States.

The report also uses other numbers to tell its story. During the past 15 years, there have been over 45,000 separate, recorded incidents of shootings, bombings and arson. The losses from damage to the Northern Ireland economy and the drain on the British budget now total in the billions of dollars.

These stark figures suggest an

MAYOR RAY FLYNN

irrefutable truth: the status quo in the North of Ireland is unacceptable.

The report proposes three possible political solutions for the conflict. It outlines plans for a 32-county, unitary state; a federal state; and a Northern Ireland administered jointly by England and the Irish Republic. Each of these options recognizes that the partition of Ireland is unworkable; that the Irish people as a whole must have a voice in the political future of any part of their island.

The forum report also states that peace in Ireland will be possible only when the human rights of all her people are respected and upheld. The violations of those rights over the years have, appropriately, made Northern Ireland a center of international attention. This year, as Americans make the decision on a candidate for the presidency, human rights for Ireland

must again be placed high on the country's foreign policy agenda.

In less than three weeks, President Reagan will visit Ireland and England. Last month, at a dinner in Washington, I spoke about these issues with the president. I asked him to use his visit to deliver the message that the restoration of human rights in Ireland is a matter of abiding concern to millions of Americans.

In a letter to the president on April 23, I followed up on the ideas that had come up in our conversation. All Americans of good conscience share a belief in the human and civil rights of each individual, regardless of that individual's religion, race, sex or nationality. I reminded President Reagan that his upcoming trip, coming so closely after the publication of the forum report, will be an unprecedented opportunity to enhance prospects for peace in Ireland.

No country is in a stronger position to assist Ireland in fashioning a future that embraces all of her people; in which cooperation and mutual respect become the rule.

A call to Reagan to help on Ulster

RAYMOND L. FLYNN

Boston Mayor Flynn sent this letter to President Reagan last week:

Dear Mr. President:

I am writing to share some thoughts with you as you prepare for your trip to Ireland. It is my hope that your voyage will be productive and safe, and it is also my hope that you will see the trip as an opportunity to assert the United States' commitment to the upholding of human rights in the strife-torn north of Ireland.

As I write today, I join millions of Irish Americans and all Americans of good conscience in pausing to commemorate the 68th anniversary of the Easter Rising. That heroic event in 1916 led to the freedom of most of Ireland, and sounded a call for freedom and human rights that still echoes today.

It echoes not only in the streets of Belfast and Derry, but in El Salvador, South Africa and Afghanistan: in every village and nation in the world where fundamental human rights are denied.

As we reflect on the significance of the Easter Rising, it is timely to consider the thoughts of the late Terrence Cardinal Cooke. In a statement shortly before his death in 1983, the cardinal spoke out on Northern Ireland.

"The continuing situation of injustice, suffering and extremist terror in the north of Ireland is the primary issue facing us today and it must be addressed with urgency."

Cardinal Cooke also said, "As a son of Irish immigrants, whose parents and ancestors experienced this

suffering and oppression, I would like to once again share my own convictions and call on my fellow American citizens, especially those of Irish heritage, to take very definite steps which will help the cause of peace, justice, freedom and the restoration of basic human rights and equal opportunity in that troubled land."

As a leader of the free world, and as President of the nation that is the home of freedom and opportunity, you are in a unique and important position to take up Cardinal Cooke's call. A deliberate and forceful statement from you will help to strengthen the final agreement among the par-

While we condemn the symptoms of violence in Ireland, we must also work to end the cause of that violence.

ties who have been meeting in the New Ireland Forum.

The upcoming forum report could provide an opening to frank discussion of the North in both Great Britain and the Republic of Ireland. The President of the United States has a part to play in any discussion of a legitimate quest for human rights, and your trip to Ireland and England in June will offer the opportunity to help this process in Ireland.

The need for fresh and determined initiatives in Northern Ireland has been described by many observers, but seldom as eloquently as by Sean MacBride, winner of the 1974 Nobel Prize for Peace.

"Time after time, new internment camps, and prison camps [have been] built and filled. Public Safety Acts, Emergency Powers Acts, Treason Acts, Offenses Against the State Acts, Law Enforcement Acts and Special Powers Acts succeeded each other north and south, and have virtually destroyed the rule of law system which should prevail in any democratic state," MacBride wrote.

The tragic and violent 62-year history of the statelet of Northern Ireland is rooted in violence. The leaders of the Irish movement for independence accepted the partition of their country under the threat of "immediate and terrible war." Today, that legacy of violence is the inheritance of the Catholic population of the North, on whom repressive laws and discrimination fall most heavily.

To again refer to the statement of Cardinal Cooke, "The denial of human and civil rights is evidenced in employment, housing, education, and in the legal system of Northern Ireland."

You recently supported the Irish prime minister, Garret FitzGerald, in his plea to Congress to disarm the men of violence in Northern Ireland. I would suggest that the next logical step is to call into question the environment of violence in which these groups are born.

While we condemn the symptoms of violence in Ireland, we must also work to end the cause of that violence. We must make human rights for Ireland an important goal, to be pursued aggressively.

I trust that you will consider these ideas as you prepare for your trip, for, as the Bible tells us, "Peace will come only when justice prevails."

NEW YORK TIMES

THURSDAY, AUGUST 1, 1984

For Irish Peace

By Raymond L. Flynn

BOSTON — The events of the past few days in Belfast — particularly the killing by British-backed security forces of an unarmed, 22-year-old Roman Catholic father at a peaceful rally on Sunday — are a compelling argument for an increased American role in the quest for peace with justice in Northern Ireland.

Four major Irish political parties — three from the south and one from the North — have prepared a discussion of possible options that the British Government could use as the basis for negotiations with Irish leaders. The United States must not allow Britain to walk away from this opportunity.

The New Ireland Forum Report, signed in May, sketches three possible futures for the North: A united 32-county Ireland, a confederated Northern and southern Ireland and a Northern Ireland ruled jointly by Britain and the Irish Republic. Above all, the report recognizes that the maintenance of partition by force is unwarrantable — that it only invites opposition

less." Then he praised them for "bringing the three men to justice, in this case, the final court of justice."

In such a situation, is there any doubt that British and Irish officials should try to put aside their differences and make a fresh start along the lines set out by the Forum?

The report itself said that 2,300 men, women and children have been killed in the North since 1969. This is the grim legacy of a state founded on discrimination and injustice. The efforts by the nationalist minority in the North to redress their grievances have been met historically with coercion by British-backed courts and security forces.

Mary Holland of the Irish Press, one of Ireland's major daily newspapers, has uncovered evidence that the British security forces operate on the principle of "shoot to kill." On June 14, she wrote about 14 recent cases in which unarmed people were gunned down by soldiers. "The overwhelming majority of the victims were in their teens and early 20s. Many had no connection with any paramilitary organization. Of those who did, only a tiny minority were actually wanted by the police for questioning."

In these conditions, is it surprising that official terror has reaped a response in kind?

The late Terence Cardinal Cooke recognized that the United States could play a constructive part in pressing for a solution in Ireland:

"The continuing situation of injustice, suffering, and extremist terror in the north of Ireland is the primary issue facing us today and it must be addressed with urgency." Yet little progress has been made and even less pressure has been brought to bear on Britain, the key actor in this tragedy. The British argue that Northern Ireland is an internal matter. History argues that it is a matter of international interest.

President Reagan missed a special opportunity on his trip in June to Ireland and Britain. He could have urged Prime Minister Margaret Thatcher to accept the New Ireland Forum Report with the same seriousness with which it was offered. Neither he nor the Prime Minister need to take a position on any of the proposed solutions. Rather, they could have acknowledged the scope of the problem and the thoroughness of the report's analysis.

The President's apparent unwillingness leaves the task to others. The leadership of the Democratic Party should seize the opportunity to fill this vacuum, declaring a commitment to human rights that can be heard across the Atlantic. The United States is regarded as a longstanding friend by both Ireland and Britain. We should take advantage of that good will and send a special envoy to press for peace.

We must define and advocate a political solution that includes the nationalist minority and upholds the rights of all citizens, regardless of religion or political outlook. □

America must press Britain to respond to 4 parties

through violence. It also recognizes that the Irish people as a whole must have a voice in the destiny of their island.

The humanitarian tone of the report, the range of the options presented and the involvement of four of Ireland's major parties should make clear enough that it is not a partial document or a binding, narrow prescription. Nevertheless, James Prior, the British Conservative Party's spokesman for Northern Ireland, has dismissed the proposals as "one-sided and unacceptable." Nothing could be further from the truth.

Anyone who doubts the need for a political solution of the kind outlined by the report should consider the comments of a Northern Irish judge ruling in June in a controversial case involving three Northern Ireland police officers. Lord Justice William Gibson acquitted the three officers in the killings of three unarmed men who were suspected of involvement with the Irish Republican Army and he dismissed the case, calling the three officers "absolutely blame-

Raymond L. Flynn is the Mayor of Boston.

Flynn gives city a foreign policy

NO, BOSTON does not have a deputy mayor in charge of foreign affairs. But, curiously enough, it does have a mayor with a foreign policy, a mayor with a keen interest in what is happening in the world who is also quick to speak out on human rights issues.

But whether anyone is listening to him is another matter. Still and all, that does not seem to bother Ray Flynn.

"I agree that it is rather unusual," Flynn said when asked about his frequent comments on human rights abuses in South Africa, or Northern Ireland, the Soviet Union, and Poland. "But Boston is not just another city," Flynn said, "not with its long history."

And Flynn, apparently, is not just another mayor. I mean, how many mayors do you know who send letters to Anasety Deryn, the Soviet Ambassador to the United States, or to Alexander Rekhov, the prosecutor general in the Soviet Union?

□ □ □

THIS came about in November when Flynn, in between trying to work with Police Commissioner Joe Jordan, whom he wants to remove, and declaring war on the combat zone, learned that five Soviet citizens had been arrested for teaching Hebrew.

"This is one more example of the oppression of Soviet Jews," Flynn said in his letter to the two Soviet officials. "In the interest of decency, I ask your government to stop the proposed trials of these individuals, release them immediately, and allow them the right to continue to teach and to practice the Hebrew language."

Neither Soviet official has replied to Flynn's letter but that has not deterred the mayor. "It is important to continue to speak out against injustice, whether it's in Boston or in Belfast," Flynn said.

Practically one of Flynn's first accomplishments upon becoming mayor was to sign into law the City Council ordinance that mandates the disbursement of city funds from any institution that does business with South Africa. Flynn sent a letter to more than 100 mayors urging them to follow his lead on the South African apartheid issue, and he got the executive board of the U.S. Conference of Mayors to endorse his proposal.

Hardly had the Rev. Jerzy Popieluszko, the Polish Roman Catholic priest, been kidnapped and murdered, presumably by Polish security officials, than Flynn declared the week of Nov. 3 as Father Popieluszko Week. Flynn conducted a City Hall tribute to the priest and had the flags at City Hall flown at half-staff.

"This brutal and despicable act underlies the institutionalized repression that is rampant in that strife-torn nation," Flynn said. "The martyrdom of Fr. Popieluszko is a violent assault upon Catholics, and indeed all freedom loving people, including the people of Poland. We as a city fight for human rights and religious liberties."

PETER LUCAS on politics

Northern Ireland, and Great Britain's continued armed presence there, an issue close to Flynn's heart. Flynn, who follows developments there closely, was quick to react after British Prime Minister Margaret Thatcher and Irish Prime Minister Garret FitzGerald, failed to come up with any agreed to solution to the problem following a summit meeting by the pair on Northern Ireland.

Thatcher flatly ruled out all of FitzGerald's proposals. In a tough, unyielding statement, Thatcher said: "I have made it clear that a unified Ireland was one solution that is out. A second solution was a confederation of two states (Northern Ireland and Ireland). That is out. A third solution was joint authority. That is out. That is a derogation of sovereignty."

Flynn, who has visited Ireland, but not Northern Ireland, accused Thatcher of a "blatant unwillingness" to confront the source of the problem in Northern Ireland.

Flynn may ruffle some feathers with his comments on the abuse of human rights in other countries, but he believes it is important to speak out.

"The British have got to come to terms with the reality that the forced separation of Ireland by Britain against the wishes of the majority of the Irish people is the real question of majority rule," Flynn said.

"That forced partition along with the inherently discriminatory state which they created in Northern Ireland — which has more in common with South Africa under apartheid or with the Soviet Gulags than western democracy — remains the principle source of violence," he said.

Flynn said that violence in Northern Ireland was inherent in the institutions the Brits set up there, like trials without juries, for instance, and discrimination against the minority Irish Catholics by the British and the majority Protestants.

"This isn't some some British domestic problem as British policy makers would have us believe," Flynn said. "It's a very real problem where we see Britain violating the human rights of Irish men and women."

Flynn may ruffle some feathers with his comments on the abuse of human rights in other countries, but he believes it is important to speak out — as long as he continues to function well as mayor, that is.

And, who knows? It doesn't cost anything, and a small something good may come out of it.

Peter Lucas is a Boston-based writer.

The Boston Herald
Wednesday, November 28,
1984

Monday, November 28, 1964

The Philadelphia Inquirer

Britain's abuse of Ireland's national rights

By Raymond L. Flynn

British Prime Minister Margaret Thatcher is scheduled to meet today with Irish Prime Minister Garrett FitzGerald in London to discuss relations between their two countries.

Clearly, both governments must be ready to negotiate and compromise, but Britain holds the key. The British government must come to terms with the subject failure of the partition of Ireland if the conflict is to end.

The legacy of Britain's current injustice in Northern Ireland portrays a system more at home with South Africa under apartheid and the Soviet gulags than with a rule of law based on respect for human rights. The European Commission on Human Rights at Strasbourg condemned the torture of Irish nationalists prisoners in a historic ruling in 1978. There is ample evidence of British rule as a propagandist in the violence. The suspension of trials by jury, the use of paid informers and military judges and the authority of British security forces to shoot suspected Republicans on sight without

fear of legal rectification continue.

The British government contends that its policy in Northern Ireland is premised on "upholding the rights of the majority of the people of Northern Ireland to remain as part of the United Kingdom." But by what measure did Britain have a right to partition Ireland?

No referendum was awarded to the people of Ireland at the time Britain arbitrarily partitioned that country in 1921, nor has respect for the wish of the majority of the Irish for unity been recognized by Britain.

The recognition of Britain's arguments that it is upholding majority rights in Northern Ireland is underscored by the fact that two of the six counties forced by Britain into the Northern Ireland border — Fermanagh and Tyrone — continue to hold substantial nationalist majorities. Yet only by coercion do they remain under British rule.

The reality is that the partition of Ireland by Britain in defiance of the will of the majority of the Irish people — without their consent at any time — has disrupted the life of Britain and Ireland for over 40 years. The proves unworkability of parti-

tion make this need to recognize Britain's demand that the partition was not originally intended as a permanent arrangement by the British at the time Northern Ireland was set up in 1921.

An important voice of reason who comprehends Britain's responsibility to correct its errors in Ireland is John Austin Baker, former chairman to the British House of Commons. In 1960, Baker observed:

"The British government ought never to forget that this partition was ... in the overthrowing of a minority from which our country is primarily responsible. England retained Ireland for its own military benefit ... and then, when it could no longer hold on to the whole island, kept back part to be a base for the rest of its dominions. Our injustice created the situation, and by constantly repeating that we will maintain it so long as the majority wish it, we so effectively inhibit Protestant and Catholic from working out a new future together. This is the root of violence."

Britain has over the years of as

many years witnessed on the Irish every variety of oppression and cruelty. Removed of all pretense, we see today in Northern Ireland the continuation of that failed policy.

Britain came to Ireland in control and today holds part of it through the institutionalization of legal and political violence. By ignoring the reality of the institutionalized violence which the British Unionists while denigrating the human rights of the Nationalists, it is put in every sense as much in Britain's interest as it is for Ireland's that for majority government purposes, in a genuine way, a path toward peace and reconciliation for all of Ireland?

By its "partnership" to the Nationalists in an artificial sense, Britain has created a political Frankenstein's monster. It is given that the largely Protestant Unionist population, which has benefited over the Nationalists through the device of special privileges in employment and other key areas, will not easily support a process of reconciling all the people of Ireland. But as long as Britain holds on to its increasingly tenuous guarantees to these northern Unionists they will

continue to have little incentive to look for reconciliation with these fellow Unionists and women and to the rest of Ireland.

Thus, due to Britain's maintenance of an untenable status quo, the quest for an end to violence continues, engulfing the lives of people in both Britain and Ireland.

Why the existence of separate traditions often amounts to a virtue in other nations and yet in the case of Ireland remains in Britain's view a reason for the continued translocation of Ireland is a question Britain must answer to, by assuring the Unionist minority of Ireland that it may continue as a majority with a privileged position at the expense of Irish Nationalists in an artificial sense, Britain only prolongs the violence.

The British writer Samuel Johnson observed that "nothing serves so much to arouse the ire in a rational Englishman than the mere mention of the word Ireland."

The time for Britain to begin acting rationally in Ireland has long since passed.

(Raymond L. Flynn is mayor of Boston.)

NEWSPAP, SEPTEMBER, 1984

Tuesday, Dec 4, 1984

Britain's Culpability in Ireland

By Raymond L. Flynn

Anglo Irish relations are now at a critical crossroads. The recent summit between British Prime Minister Margaret Thatcher and Irish Prime Minister Garret FitzGerald produced only the hope for further discussion in the future.

Thatcher rejected outright proposals that provided an agenda for the peaceful resolution of the long-standing conflict in Northern Ireland. She was apparently more interested in the maintenance of an untenable status quo.

If peace is to be established, then the British government must first institute policies to end the human rights violations that have characterized the governing of the North since Britain's arbitrary division of Ireland 62 years ago.

British policymakers may claim that the blame for the violence lies solely with "the troublesome Irish," but Britain's role as a protagonist of conflict in Northern Ireland is quite real.

Violence was the British response to the nonviolent civil rights movement in 1969 against British-supported laws that discriminate against Catholics in employment and housing. As the late Terence Cardinal Cooke testified, discrimination is pervasive in Northern Ireland society: "The denial of human and civil rights is evidenced in employment, housing, education, and in the legal system of Northern Ireland."

Participants in the civil rights struggle were arrested, interned and subjected to police harassment — often with the police aiding the mobs of Unionists (those who favor continuing political union with England). This culminated on Bloody Sunday: the killing of 14 civilians by British soldiers on the streets of Derry at a peaceful public demonstration on Jan. 30, 1972.

Rather than redress these legitimate grievances, the British government resorted to harsh laws, biased courts, the torture of detainees, the suspension of jury trials and the deliberate firing by British security

forces into crowds of unarmed protesting marchers.

In 1978, Britain's torture of Nationalist prisoners was fully exposed and condemned in the legal proceedings brought by the Irish government before the European Commission of Human Rights in Strasbourg. Unfortunately, this untenable approach by Britain continues in Northern Ireland.

Dr. John Austin Baker, the Anglican theologian and former chaplain of the British House of Commons, noted in 1980: "England seized Ireland for its own military benefit. . . when it could no longer hold on to the whole island, it kept back part of it to be a home for the [British] settlers' descendants; a nonviable solution from which Protestants have suffered as much as anyone else."

"Our injustice created the situation, and by constantly repeating that we will maintain it so long as the majority wish it, we actively inhibit Protestant and Catholic from working out a new future. This is the root of the violence."

The Conservative government entered the summit with the shock of the October bombing of Thatcher's Brighton hotel still fresh in their collective memory. Yet they must not allow this atrocity to cloud the clarity of Baker's advice. The status quo in Northern Ireland serves no one. The Nationalist population — those who favor a united independent Ireland — daily grows more alienated and hostile to British policy.

The increasing polarization gives the hard-liners among the Unionists a firmer platform from which to spread their blind hatred. British families continue to send their sons to die across the Irish Sea. The social, political and financial price of present policy climbs higher, yet it purchases no enduring solution.

We Americans need no lessons on how people, even the most gentle, respond to tyrannical conditions. Peace comes only when justice prevails. Britain must no longer ignore this lesson in Ireland.

Raymond L. Flynn is mayor of Boston.

NEWSPAP, TUESDAY, DECEMBER 4, 1984

NY 51

Status quo no solution to 'the troubles' for Britain in Northern Ireland

MAYOR RAY FLYNN

THE RECENT summit between British Prime Minister Margaret Thatcher and Irish Prime Minister Garrett FitzGerald failed to produce results that point to a lasting resolution of the conflict in Northern Ireland.

Thatcher's outright rejection of the three peace proposals offered by the four Irish constitutional parties suggests that Britain remains content with an unchangeable status quo. Paramilitary and official violence will continue to engulf the Irish people in both Britain and Ireland.

British families will continue to send their sons to die in the Irish Sea and Irish families will still continue to see their children die in the streets. The social, political, and financial price of British policy will climb higher, yet it will purchase no lasting solution.

Britain created this problem and the government continues to hold the key to its solution. Britain must come to terms with the object of the Irish treaty partition of Ireland if the conflict is to end. The British government established Northern Ireland as a separate state 60 years ago without the consent of the Irish people.

Britain's attempt was to ensure a majority there that would be Protestant by religion and politically loyal to the British Crown.

In order to achieve this objective, a multinational minority, mostly Catholics in religion and opposed to the division of Ireland, was introduced through systematic discrimination in employment, education, housing, and criminal jus-

tics. This discrimination has been maintained historically through force.

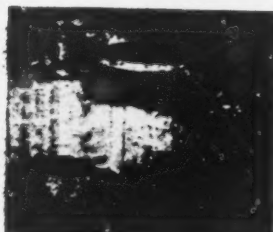
In turn, the use of force has been justified by a specious claim that is exercised only as a defense of the rights of the majority, loyalist population of Northern Ireland. The basis of this claim is established in the fact that two of the North's six counties — the nationalist counties of Fermanagh and Tyrone — are held under British rule only by coercion.

Discrimination and coercion are the weapons that support the artificially balanced Northern state.

As Professor Brian Brady of St. Joseph's College, Belfast, noted, "The success of the policy of anti-Catholic discrimination in maintaining that balance has been remarkable." The 1976 U.S. Congress by the Senate's civil rights group in 1981, the overall results of anti-Catholic discrimination in the manufacturing sector of the Northern Ireland economy show that the work force was 72 percent Protestant and 19 percent Catholic, despite an actual population that is 60 percent Protestant and 40 percent Catholic.

At the Ford Motor plant in Belfast, the only category in the unskilled work force where Catholics outnumbered Protestants was in the maintenance area.

But the industrial area is not the only area of discrimination in Ireland, goes beyond economic



PRIME ministers Margaret Thatcher of England and Garrett FitzGerald of Ireland have had little success in resolving the conflict in Northern Ireland.

As the European Commission's Human Rights at Strasbourg condemned Britain for the torture of Irish nationalist prisoners in a historic ruling in 1978, there is ample evidence that Britain's policy of security by force in Northern Ireland continues to be a failure. The suspension of trials by jury, the use of paid informers, and biased judges and the authority of British security forces to shoot suspected Republicans on sight without fear of legal retribution are all meant to support this policy.

Many Holland of the Irish Press, one of Ireland's major daily newspapers, has uncovered evidence that the British Security forces operate on a shoot to kill basis.

Recently, she wrote about 14 cases in which British soldiers were gunned." — by British Sol-

The use of force has been justified by a specious claim that is exercised only as a defense of the rights of the majority, loyalist population of Northern Ireland. The bankruptcy of this claim is exposed by the fact two of the North's six counties — the nationalist counties of Fermanagh and Tyrone — are held under British rule only by coercion.

discs. "The overwhelming majority of the people here are Catholics and early 20's. Many had connections with any paramilitary organization. Of those who did, only a tiny minority were actually wanted by the police for questioning."

There are a number of reasons why Britain's policy to correct the workings of the British policy in Northern Ireland. Among them is Dr. John Austin Baker, the Anglican theologian and former chaplain of the Irish House of Commons. In 1976, he stated that the British government could never hope to achieve its goal of a united Ireland that this perilous moment, like many before it, is the outworking of a history that it may continue indefinitely as a majority with a special position, Britain in Northern Ireland.

"England realized... when it was too late... that the whole island it kept back of it to be a home for the settlers' descendants, a non-viable solution from which Protestants have suffered as much as anyone else."

"Our injustice created the situation, and by constantly repeating this, they will maintain it. So long as the majority wish it, we

actively inhibit Protestant and Catholic from working out a new future. This is the root of the violence."

The grim reality is that the status quo in Northern Ireland serves no one. The nationalist population grows more alienated and hostile to British policy. The increasing polarization gives the loyalist population a sense of being benefitted over their nationalist countrymen in employment and other areas through the British guarantee, little incentive to join with the rest of the Irish people in building an Ireland that will accommodate the interests of all of its people.

By assuring the loyalist minority of Ireland that it may continue indefinitely as a majority with a special position, Britain in Northern Ireland prolongs the violence in Northern Ireland. The need to leave on how people's own need to leave, respond to tyrannical conditions. Peace comes only when justice prevails. Britain must no longer ignore this lesson in Ireland.

Ray Flynn is mayor of the city of Boston.

Ireland's British Problem

It Isn't Religion That Separates North From South

By Raymond L. Flynn

A curious event occurred at a Belfast civic hall last month when thousands of Northern Ireland Catholics and Protestants joined to cheer on fellow Ulsterman Barry McGuigan in his vigorous boxing encounter against a more favored opponent.

Curiously, for many observers, no British troops were needed to keep the sides apart. Perhaps, after all, they were simply Irish men and women of different traditions cheering on a native son.

The question that event begs one to ask is why is it that the existence of separate traditions is often a virtue in other nations and yet, in the case of Ireland, remains, at least in Britain's view, a reason for the continued division of that country? That is a question Britain must answer to. Certainly, the complexity of the Northern Ireland problem and the effect upon generations there of a failed British policy that continued institutionally to favor one segment of the population — the Protestants — over another — the Catholics — will surely be solved by resort to shared sporting encounters.

Yet the very fact that large numbers of Catholics and Protestants can gather together in Belfast without British interference profoundly undermines the British claim that their military presence in Northern Ireland is needed in order to keep warring tribes of Northern Ireland Catholics and Protestants apart.

Indeed, the record shows that rather than serve in the role of peacekeepers, the British, more often than not, have served as protagonists of violent conflict in Northern Ireland. Their credibility as self-proclaimed bearers of the peace was forever shattered on the streets of Derry in January of 1972 when 13 unarmed Catholic civil rights marchers were shot dead by the British army. Remember that face a tribunal, the officer in charge of the bloody episode was in fact promoted.

The continued deadly shooting of unarmed Catholics virtually on sight by British security forces — 14 such cases

occurred in 1984 — serves to underscore that there is good reason for Catholics in Northern Ireland to feel alienated from British rule.

Ironically, before Congress last month, Prime Minister Thatcher reasserted Britain's right to sovereignty in Northern Ireland. Yet nowhere is mainland Britain — be it in Surrey or Lancashire — are unarmed British citizens shot dead on sight, without warning by law enforcement officials. Nei-



ther are British children's lives jeopardized by lethal plastic bullets fired at close range by British soldiers.

In recent years, some 12 Catholic children have died as a result of these bullets. And now more than six months since the shooting death of an unarmed Catholic at a peaceful rally in Belfast by a British soldier, the British government has still failed to produce the report it promised last year. This aspect of the violence in Northern Ireland, produced by the British security forces, is as counterproductive to peace as the senseless violence of the paramilitaries, and just as worthy of condemnation.

Indeed, throughout Northern Ireland's 63-year existence, violence has been the grim legacy of this British-backed statelet, which was founded on discrimination and is now sustained through injustice.

Anyone who doubts the need for the British government to seek a political solution and to depart from its policy of ignoring the right of the Irish people as

a whole to have a voice in the destiny of their island should consider the comments of a Northern Irish judge. Last June, while ruling in a controversial case involving three Northern Ireland police officers, Lord Justice William Gibson acquitted the three officers in the killings of three unarmed men who were suspected of involvement in the IRA. He dismissed the case, calling the three officers "absolutely blameless." He then praised them for "bringing the three men to justice, in this case, the final court of justice."

In such a situation, coupled with the new wave of paramilitary and official violence, is there any doubt that British officials should engage their Irish counterparts in the effort to find peace with justice for Northern Ireland?

At the time of the establishment of Northern Ireland by Britain in 1921 without the consent of the Irish people, Michael Collins, the Irish revolutionary leader, raised questions concerning the legitimacy of that state which remain valid today. Collins asked: "Who will not say that from Britain's policy it is the North (Northern Ireland) which has suffered the most? She has lost economically and spiritually... a large portion of her fair province has lost all its native distinctiveness. It has become an inferior Lancashire. That is the unhappy fate of the North."

"It is neither English nor Irish. So long as there are British troops in Ireland, so long will the Orangemen (the Ulster Protestants) hold out. While they can look to Britain they will not turn towards the South."

The surest way to peace is for Britain to work for an end to its role as the source of division among the Irish people — both Catholic and Protestant. A declaration of intent by Britain to withdraw at a specified time would be an important first step. Perhaps in regard to Ireland, Britain could well follow the example of Oliver Cromwell's admonition to the Rump Parliament: "In the name of God, go!"

Raymond L. Flynn is the mayor of Boston.

THE CHRISTIAN SCIENCE MONITOR

AN INTERNATIONAL DAILY NEWSPAPER TUESDAY, OCTOBER 2, 1984

Toward an Anglo-Irish peace process

By Raymond L. Flynn

THE 'id empire' is gradually faded for Britain and it is time to change its imperial posture toward Ireland, its first colony.

Britain's recent announcement regarding Hong Kong, another land whose name connotes the "glory days" of empire, makes even more compelling the need for British action in Ireland. The British have agreed to relinquish control of the colony by the year 1997. They have recognized that Hong Kong is an integral part of the People's Republic of China and they have negotiated a peaceful, planned disengagement.

Four of Ireland's constitutional political parties recently presented the British government with an opportunity to begin serious discussion on the North. The New Ireland Forum Report, which developed from months of study and debate of the issue, studied all facets of the Northern Ireland question, and proposed realistic options for reform. Members of the forum based their work, and their presentation to the British government, on the premise that any solution must recognize the dignity and include the consent of all sides in the Six Counties.

To date, the British have made little response to the report, and their few comments have been negative.

If there is one side that the report takes, it is the side of human rights. What is unacceptable in Northern Ireland is the official and paramilitary terrorism that tramples human and civil rights and which has become the governing factor in Northern Irish life. Recent reports on the situation demonstrate that conditions are worsening.

Mary Holland, a reporter for the Irish Press, one of Ireland's major daily newspapers, uncovered evidence that British security forces have been operating on a "shoot to kill" principle. She reported a clear pattern in the shooting deaths of several men in their early 20s. Each victim was unarmed when shot down by soldiers.

Since 1969, over 2,300 men, women, and children have been killed in the North, according to the forum report. As the report states, those deaths, in an area with a

population of 1.5 million, are equivalent to 350,000 deaths in the United States.

The violence is rooted in the discrimination that was present at the very founding of the Northern Ireland state. The late Tarcena Cardinal Cooke described the breadth of this discrimination: "The denial of human and civil rights is evidenced in employment, housing, education, and in the legal system of Northern Ireland."

In an atmosphere of violence and discrimination, reasonable people must look for the means to create peace and equality. This is what parties to the New Ireland Forum are seeking. They are still awaiting word from London as to whether that goal is shared.

While the Irish wait for the British to act, US leaders must also consider their responsibility on the issue of human rights. The American people have a long tradition of commitment to upholding human rights at home and around the world. It is sometimes surprising that our national leaders are so hesitant to challenge the British government on its dismal record in Northern Ireland.

President Reagan missed a very special opportunity to help the peace process when he visited England and Ireland last June. The President chose not to discuss the forum report with Prime Minister Thatcher, thus missing the chance to demonstrate the seriousness of American feeling on this issue.

In the absence of clear leadership, others must step up to represent our commitment. One way to make the message clear is to appoint a special envoy to Britain and Ireland. That individual would be charged with helping to bring the parties together for productive discussion.

The first step in the Irish peace process is the establishment of justice and democracy in the North. Lasting peace can be achieved when justice prevails.

Although Ireland was England's first colony, part of that nation need not be condemned to be its last. The peace process advocated by the forum provides Britain and Ireland with an agenda for the peaceful resolution of that centuries-old conflict.

Raymond L. Flynn is the mayor of Boston.

To: TFE

Oct. 8, 1985

From: Mike Reis

Re: U.S.-U.K. Extradition Treaty and Lincoln's actions during the Civil War

Between the firing on Ft. Sumter and the special session of Congress convened on July 4, 1861, Lincoln took the following acts -- all of doubtful legality unless justified under the Oath-of-Office ("...preserve, protect and defend the Constitution") and his own broad interpretation of Presidential war powers:

1. Suspended habeas corpus along the line between Washington and the North.
2. Ordered the South blockaded without recognizing the South as a "belligerent" at war with the U.S.
3. Authorized arrest of all "potential" traitors "deemed dangerous to the public safety" along line of supply and communications between Washington and Philadelphia.
4. Closed mails to "treasonable correspondence".

Later in 1861, he kept Maryland in the Union by acquiescing in the arrest of seven secessionist state legislators in Annapolis and the Mayor and Police Chief of Baltimore. In Kentucky, the state's plea for status as an "armed neutral" was rejected by Lincoln, who tolerated the intimidation of the Kentucky legislature by Union officers in order to get a Unionist government in the state.

In Missouri, the legislature was forcibly reconvened to counter the secessionist attempts to make their "legislature" (in exile due to Union successes) the legitimate voice of Missourians. Missouri was thus kept in the Union. Later in the War, Lincoln did not overrule General Thomas Ewing's famous Order No. 11, which forced Missourians in the counties bordering Kansas to evacuate their homes and leave the region. Ewing, like nearly all Union generals, claimed "military necessity" as his reason for this order aimed at Quantrill's Confederate guerrillas. Like Johnson's and Nixon's attempts to "interdict" the Vietcong "bases" in Cambodia, Ewing's and Lincoln's efforts to "clean out" the farms supplying Quantrill failed to stop the "rebel raiders" in Missouri. Evidence is that Quantrill and his gang were only enraged to commit still more terrorist acts to undermine the Union hold on Missouri.

By the Spring of 1862, Lincoln had "conquered" Southern territory on his hands. Asking no guidance from Congress, he appointed provisional governments in Arkansas, Louisiana, and Tennessee. The governors were directly responsible to him and were instructed to cooperate with Union officers in setting up provisional courts with "...the unlimited power of determining every question that could be the subject of judicial decision." The governors were enjoined by Lincoln to "follow forms of law as far as convenient..."

In September, 1862, Lincoln suspended habeas corpus again -- this time throughout the country. Though Chief Justice Taney in Ex parte Merryman warned Lincoln that he lacked this power, Congress in March, 1863, passed a Habeas Corpus Act which made clear that suspending the writ was a step to be taken by the President and Congress together.

As for freedom of the press, Lincoln's record is pretty good. Wartime intolerance for "secesh" editors in some parts of the North could not be controlled by Lincoln. But when he could, he intervened to stop Union generals and agents from suppressing newspapers. He revoked General Burnside's angry seizure of the Chicago Times office and banished Clement Vallandigham to the Confederacy under Union escort (instead of trying the bitter Confederate Vallandigham for treason).

Martial law was frequently imposed during the War -- even in regions far from the action. After the War, the Supreme Court (Ex parte Milligan) ruled against Lincoln's martial law declaration in Indiana and said that the ordinary rule of civil law is not suspended in places distant from the fighting in a civil war. By this time, however, Lincoln was dead and the question was largely academic for the moment.

Only once did Lincoln personally order a newspaper shut down. On May 18, 1864, two reporters of the New York World hatched a scheme to make a killing in the gold market. They got the World and the New York Journal of Commerce to print a "Presidential Proclamation" calling for a day of fasting and a draft of some 400,000 more soldiers. The May 18 issues appeared with this bogus document on the front pages. The price of gold went up and the reporters -- Howard and Mallison -- sold their gold for a tidy sum. Meanwhile, Lincoln took swift action. He announced that the Proclamation was a hoax and ordered soldiers to seize the offices of the World and the Journal. By the 21st, Howard and Mallison had admitted their guilt. On that day, the newspapers were allowed to resume publication.

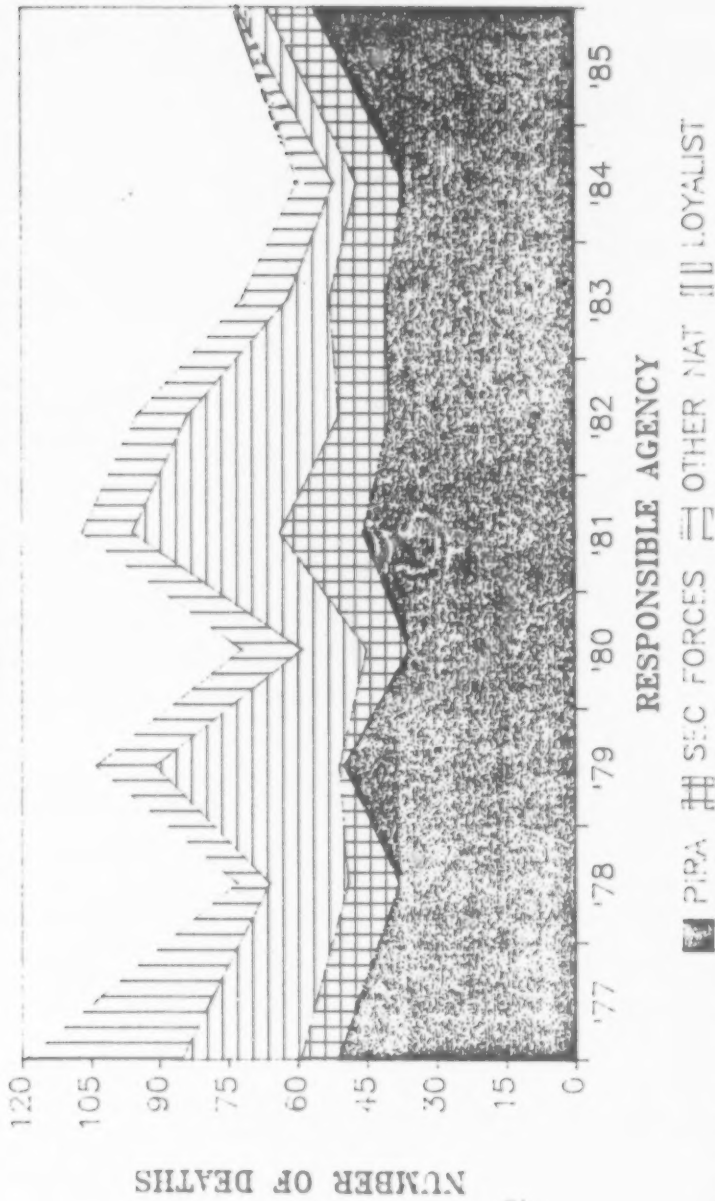
On the whole, historians now agree that:

1. Lincoln took his extraordinary measures out of a belief in the doctrine of "paramount necessity". This idea, best put forward by old John Quincy Adams in the 1840's, gave the President the power to annul select provisions of the Constitution for a time in order to save the basic framework of government during a crisis such as civil war. Lincoln's background in the Whig Party inclined him to agree with Adams.
2. Still, about 1 out of every 1500 Americans during the War was subjected to an arbitrary arrest without the habeas corpus protection. Something like 25,000 Americans were jailed without due process.
3. For all the denial of habeas corpus, only a tiny number of proceedings reached the stage of trial. In nearly all cases, citizens who were arrested arbitrarily were also released arbitrarily -- never being charged or arraigned at all.
4. Lincoln's greatest and most severe attack upon the personal rights of Confederates was the Emancipation Proclamation -- which Charles Beard once called "the most stupendous act of sequestration in the history of Anglo-American jurisprudence". Ironically, it was at the same time the greatest blow Lincoln struck for liberty.

In conclusion, a quote from Lincoln's Attorney General Edward Bates of Missouri aptly summarizes the situation. Wrote Bates in his personal diary on February 10, 1864:

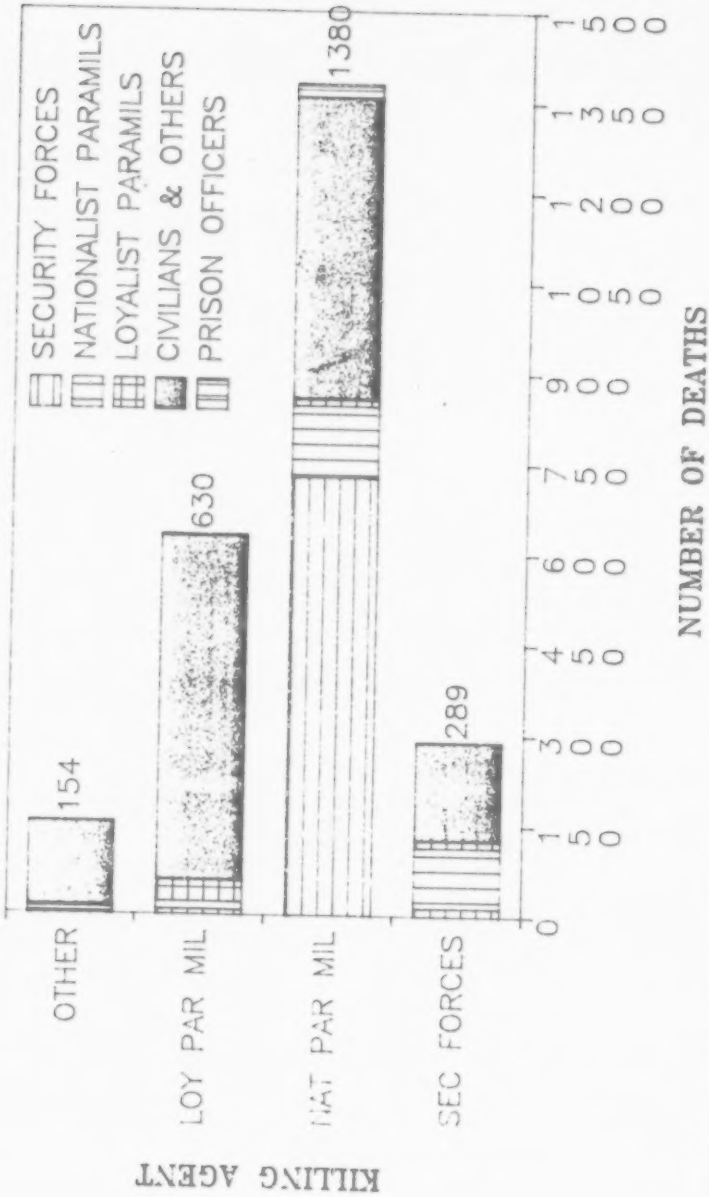
"Surely Cicero was right when he said that 'in every Civil War, Success is dangerous, because it is sure to beget arrogance and a disregard of the laws of the Government'... When the constitution fails them, they have only to say 'this is time of war -- and war gives all needed power'."

IRISH INFORMATION PARTNERSHIP
DEATHS IN NORTHERN IRELAND
BY RESPONSIBLE AGENT: 1977 - 1985.



THIS CHART ANALYSES ATROSCSHIP OF FATAL
CASUALTIES IN A PERIOD OF TEN YEARS

IRISH INFORMATION PARTNERSHIP NORTHERN IRELAND CASUALTIES BY CATEGORY OF VICTIM AND AGENT



SOURCE: IRISH INFORMATION PARTNERSHIP

Can the violence be stopped?

Anglo-Irish Agreement Pits Both Ends Against the Middle

By JO THOMAS

DUBLIN — The agreement Britain signed with the Irish Republic Nov. 15 is supposed to bring peace and stability to Northern Ireland, but last week it drew determined opposition from the leaders of the strongest political parties on both sides of the border.

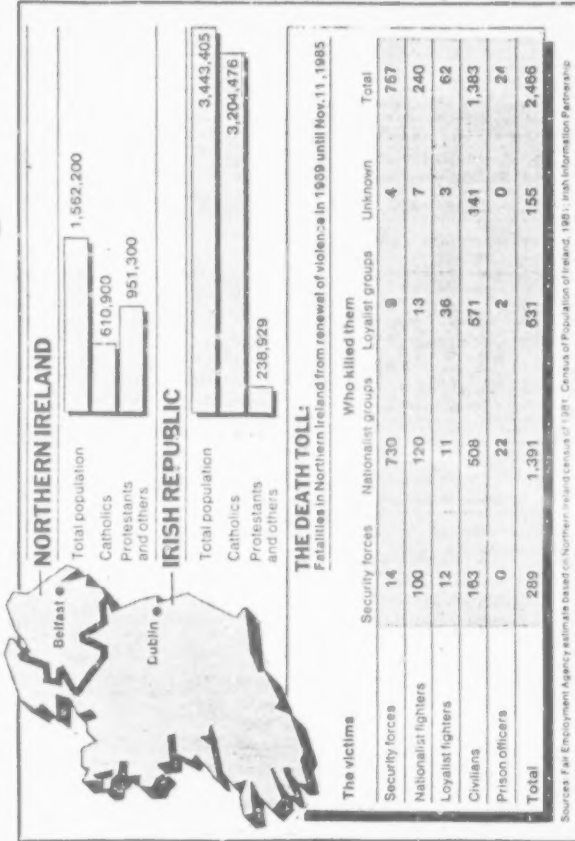
The agreement sets up an Intergovernmental Conference in which Ireland will have a consultative voice on a broad range of policy matters in the six northern counties. The British Government will change only with the consent of the population.

Far from being reassured, the Rev. Ian Paisley and James Molyneux, members of the British Parliament and leaders of the two unionist parties that represent the Protestant majority in Northern Ireland, saw Dublin's assumption of a say in policy as itself a change in status. They accused Prime Minister Margaret Thatcher of betrayal. The unionist leaders contended that the agreement gave Dublin and London a covert joint authority over Northern Ireland, which they called the first step toward a united Ireland.

A group of about 30 unionists kicked and punched Tom King, the Secretary for Northern Ireland, as he arrived for lunch last week at Belfast City Hall. Afterward Mr. Paisley told Mr. King, who will be Britain's main representative on the joint body, to "stay off the streets of Northern Ireland." Yesterday in Belfast, protesting unionists staged one of their biggest demonstrations yet. In Dublin, the Irish Republic, Charles Haughey, leader of the Fianna Fail, the main opposition party, called for a referendum on the issue of British sovereignty in Northern Ireland, the second had severely set back Irish unity. He also warned the coalition Government of Prime Minister Garret FitzGerald that, by agreeing to a consultative role under continuing British rule, it would have responsibility without power.

Despite this opposition, the Irish Parliament approved the agreement last week by a comfortable 13-3 margin. The Government had been working for some time to get the agreement passed. It is also expected to pass the British House of Commons by a large margin. A referendum has won the support of opposition leaders. Afterward, all 15 unionist members are expected to resign as a way of forcing by-elections Dec. 19.

The British Government has rejected unionist demands for a referendum. By-elections will be another opportunity for the expression of the majority, depending on the result. Such a vote would increase the risk. Four of the constituencies the unionists hold could



English and Irish: Significant Dates

1541: King Henry VIII declares himself king of Ireland.
1603: Queen Elizabeth I crushes Irish rebellion, English government controls all of Ireland.
1782: Irish Parliament granted independence through Dublin Administration is still appointed by the King.
1916: Easter Uprising in Dublin against British rule is crushed.
1918: Sinn Féin, nationalist party, sweeps election and forms first independent Irish Parliament in Dublin.
1920-21: Six Ulster counties as a British attempt to destroy Sinn Féin leads to Anglo-Irish war of 1919-21.
1920-21: Six Ulster counties as a given parliament in Belfast, dominion status granted to remaining 26.
1968: Civil rights marches in North are violently attacked.
1969: British troops arrive in Londonderry. Present phase of violence begins.
1972: Britain imposes direct rule in North.
1981: Bobby Sands, I.R.A. prisoner, dies in hunger strike, prompting nine other prisoners to die before strike is called off.

go to one of the nationalist parties, the Social Democratic and Labor Party or Sinn Féin, the political arm of the Irish Republican Army.

Gerry Adams, the president of Sinn Féin and a member of the Social Democratic and Labor Party to cooperate with his party to avoid splitting the nationalist vote and the unionist vote. But they emphatically refused. Their two main jobs, joining the army and the police, and the agreement and abhors the I.R.A.

Whoever the election results, Mrs. Thatcher ap-

pears determined to go ahead with the agreement. The conference of ministers it will set up is likely to meet before Christmas. At the top of its agenda is security.

Those who back the agreement say it will stand or fall on this issue, although their rationales differ. The British and Irish Governments, which are looking to cooperate in the defeat of the I.R.A., believe they can starve the I.R.A. support by improving the administration of the law. The I.R.A. and the Irish nationalist Unionists there view the police and the army as the Ulster Defense Regiment, both overwhelmingly Protest-

tant, as sectarian forces and complain of abuses. Mr. Hume says the acid test of the agreement will be the difference it makes in the lives of ordinary Catholics.

Peter Barry, the Irish Foreign Minister, who will be Dublin's representative in Northern Ireland, has been critical of the security forces. In Parliament last week, he also called on the I.R.A. to "put away the bomb and the gun," declaring, "The people do not want another 50 years of terror, shame and despair, whatever Mr. Adams or the I.R.A. say. The people want peace, stability and some measure of prosperity."

NEW IRELAND REFORM - 3 November 1983

- 2.3 Table 3 provides a further breakdown of the religious affiliation of 1,297 fatalities designated as civilians in table 1.

Table 3: Religious affiliation of 1,297 civilians who were killed

Religion	'69	'70	'71	'72	'73	'74	'75	'76	'77	'78	'79	'80	'81	'82	'83	Total
Catholic	7	8	62	166	75	95	104	124	33	9	17	20	27	20	6	773
Protestant	6	8	31	74	50	50	69	95	19	21	14	19	15	18	6	495
Civilians not natives of the North		1	3	2	5	4	4	2	3	1		3		1		29

- 2.4 Table 4 provides a classification of all the fatal casualties on the basis of the agencies responsible for the loss of life under the categories republican paramilitary groups, loyalist paramilitary groups and security forces. 163 cases are included under a non-classified heading*. Additional details for this table are given in table 2 Appendix I.

Table 4: Agencies responsible for loss of life 1 January 1969 to 30 June 1983

Agency	'69	'70	'71	'72	'73	'74	'75	'76	'77	'78	'79	'80	'81	'82	'83	Total
Republican Paramilitary Groups	4	18	96	255	128	98	102	142	70	52	88	49	67	72	23	1264
Loyalist Paramilitary Groups	2	2	21	103	80	94	115	111	24	6	14	14	11	11	5	613
Security Forces	9	5	41	74	32	17	7	16	9	10	1	9	18	11	5	264
Non classified*			15	42	12	12	20	27	11	2	3	6	12	1		163
Total	15	25	173	474	252	221	244	296	117	70	106	78	108	95	33	2304

*Note: The non-classified total embraces three distinct groups:

- (1) Those incidents where it is not possible to attribute responsibility.
- (2) Those incidents where there is no direct line of responsibility e.g. certain affrays or riot situations.
- (3) The deaths of the ten hunger strikers. However, accidentally self-inflicted deaths (e.g. premature explosions) have been attributed to the agency initiating the action.



Congressional Research Service
The Library of Congress

Washington, DC 20540

September 20, 1985

TO: Honorable, Thomas F. Eagleton
Attn: Donna Ridenour

FROM: Allan S. Nanes, Specialist in U.S. Foreign Policy
Foreign Affairs and National Defense Division

SUBJECT: Information on the Easter Rising in Ireland and Statistical
Information Relative to Violence in Northern Ireland.

Pursuant to your request, the attached material describing the Eastern Rising in Dublin in 1916 is forwarded herewith.

In the time available, it has been possible to obtain only partial and incomplete figures on the violence of the British against the Irish in Northern Ireland. The source of that information was the Irish National Caucus, a group that favors the end of the present regime in Northern Ireland. This information covers the period from 1969 to May 8, 1981. A summary of IRA terrorist acts from 1983 to the end of July 1985, separately included:

As of May 8, 1981, the Irish National Caucus reports the following casualties which could not be verified by CRS from any other source.

Security forces killed by loyalists	13
Civilians killed in explosions set off by loyalists	100
Civilians killed in crossfire of loyalist paramilitary organizations	10
Assassinated by the Ulster Defense Association (UDA)	496
Loyalist killed fighting security forces	13
Loyalists killed by own bombs	25

These figures do not include the categories of those innocently killed through cases of mistaken identity and so forth. Nor do they include the number of Northern Ireland individuals, of whatever political persuasion, who may have been killed or injured by British troops. The only specific killing of that type was brought to the attention of this office was that of Sean Downs, in August of 1984. In 1982 two British sergeants were given life terms for killing 2 civilians in Northern Ireland.



Congressional Research Service
The Library of Congress

Washington, D.C. 20540

January 8, 1986

TO: Honorable Thomas Eagleton
Attention: Marcia Verville

FROM: Kriszti Fehervary
Foreign Affairs Analyst
Foreign Affairs and National Defense Division

SUBJECT: IRA Terrorist Acts, 1969-1972

In response to your request, the following information was assembled on acts of terrorism by the Irish Republican Army (IRA) from 1969 to 1972.

The search was limited to incidents where the IRA was presumed to be involved or claimed responsibility. In December 1970, the IRA split into two factions, the marxist "official" group (OIRA) and the militant "provisional" group (PIRA). On the chart, the column entitled "group" indicates, where possible, which of these factions claimed responsibility for each incident.

Abbreviations follow:

IRA -- Irish Republican Army
PIRA -- Provisional wing of the IRA
OIRA -- Official wing of the IRA
RC -- Roman Catholic

The list was compiled from information provided in Facts on File Yearbook, 1969, Vol. XXIX; Facts on File Yearbook, 1970, Vol. XXX; Facts on File Yearbook, 1971, Vol. XXXI; Facts on File Yearbook, 1972, Vol. XXXII; and Keesings Contemporary Archives, Weekly Diary of World Events, 1969-70 and 1971-72.

CRS-2

<u>Group</u>	<u>Date</u>	<u>Number Killed</u>	<u>Number Wounded</u>	<u>Nature of Incident</u>	<u>Comments</u>
IRA	11/28-30/72	1		Coordinated series of rocket and bomb attacks in Belfast, Londonderry and along border.	
IRA	8/26/72	3		Bomb explosion destroyed Downpatrick race course. Victims all IRA terrorists.	Believed to be a premature explosion.
PIRA	8/17/72			Bomb wrecks pub and water main in Shankill Road district near Belfast.	
PIRA	7/21/72	9	130	20 coordinated bombings in Belfast.	Referred to as "Bloody Friday"
	7/9-21/72	41		PIRA ceasefire ended 7/9/72 sparking renewed violence.	
IRA	6/22-26/72	8		Wave of bombings up to implementation of PIRA cease-fire at midnight 6/26/72.	
PIRA	5/28/72	6		Bomb in Short Strand Belfast kills 4 members.	PIRA admitted bomb accidentally exploded in transit.
IRA	5/26/72	1	41	Car bomb kills 1 woman, injures 41.	IRA suspected but faction unknown.
OIRA	5/21/72	1		RC soldier in British Army shot in Londonderry.	
IRA	5/17/72			3 Protestants kidnapped and later rescued by British troops.	Faction unknown.

CRS-3

<u>Group</u>	<u>Date</u>	<u>Number Killed</u>	<u>Number Wounded</u>	<u>Nature of Incident</u>	<u>Comments</u>
	5/13/72			Bomb in public house in Ballymurphy sets off exchange of fire between IRA and Protestant groups.	Responsibility unknown.
OIRA	4/16/72	3	2	3 British soldiers shot and 2 wounded in Londonderry and Belfast.	Retaliation for killing of IRA member Joseph McCann.
PIRA	3/20/72	6	147	Gelignite bomb exploded in a car in crowded central Belfast street.	
IRA	2/25/72	1		Mr. John Taylor, Minister of State for House Affairs in the N. Ireland government, shot and wounded by two IRA gunmen.	Faction unknown.
OIRA	2/22/72	7	17	Bomb exploded outside the mess hall of the Aldershot Army Base in Britain, killing 5 waitresses, 2 gardeners, and wounding 17 officers.	
	1/31/72	13		British Army open fired on 7,000-20,000 people protesting the imprisonment without trial of suspected IRA members. Army claims IRA fired shots first.	Referred to as "Bloody Sunday"
IRA	12/7-10/71	3		3 members of the Ulster Defense Military shot to death in Clady, Cullough and Belfast. Victims included 2 RCs and 1 Protestant.	Faction unknown.
OIRA	12/12/71	1		Sen. John Barnhill, right wing member of Unionist party, shot to death and house bombed in Strabane, N. Ireland.	

CRS-4

<u>Group</u>	<u>Date</u>	<u>Number Killed</u>	<u>Number Wounded</u>	<u>Nature of Incident</u>	<u>Comment</u>
IRA	10/30/71			8 British customs posts along border bombed.	Faction unknown.
IRA	10/14/71			IRA ambushed British dissolution squad sparking a gunbattle of the IRA against British soldiers.	4 IRA terrorists arrested.
	8/13/71			British troops vs. IRA in gunbattle.	
IRA	7/12-13/71	2		Sniper kills British soldier in Belfast and another British soldier killed in ambush.	IRA retaliation for deaths of 2 civilians by British troops.
IRA	6/5-6/71			Series of bomb explosions.	Faction unknown.
	5/25/71	1	20	Bomb in Belfast Police station.	PIRA members claimed responsibility for 3 bombings from 5/15-25/71 but Dublin headquarters disclaimed statement.
	5/24/71		18	Bomb in pub.	
IRA	5/21/71	1	30	Bomb injures 30 in ex-serviceman's hall in Belfast, and 1 British soldier killed in unrelated incident.	
	5/15/71	1	4	British army vehicle ambushed, 1 civilian killed.	
IRA	4/20/71			British Navy survey launch "The Stork" towed to sea and blown up.	Faction unknown.
IRA	3/10/71	30		IRA assassinated at least 30 persons believed to be traitors to the IRA.	
IRA	3/8-9/71	1	3	Gun battles between PIRA and OIRA factions.	

CRS-5

<u>Group</u>	<u>Date</u>	<u>Number Killed</u>	<u>Number Wounded</u>	<u>Nature of Incident</u>	<u>Comment</u>
IRA	2/26-27/71	2	4	IRA clash with N. Ireland Police and British troops.	
	2/3-9/71	11		11 killed in clashes between armed RCs and British soldiers in Belfast.	IRA blamed by Ulster officials.
IRA	11/16/70	2		2 men shot to death in what officials believed to be a dispute within the IRA.	
IRA	9/13-14/70			IRA bombs uncovered in police raids in London.	
IRA	4/3-5/70			IRA threatened to shoot British troops in retaliation for any civilian rioter shot at by British.	
IRA	8/18/69			IRA Chief of Staff announced all members of the IRA on full alert and fully equipped units sent to Northern Ireland.	
	4/20-21/69			9 post offices, 1 bus station, 1 power pylon and 1 city reservoir bombed.	IRA blamed but denied charges.

The Boston Globe

Northern Ireland and US justice

The British government has formidable problems in Northern Ireland, trying to combat terrorism while maintaining as much as it can of the normal procedures and institutions of British justice.

Jury trials in terrorist cases have had to be sacrificed. Jurors could not deliberate freely when faced with intimidation by the Irish Republican Army or various unionist gangs. Suspects are instead tried by a single judge.

Since outside witnesses can rarely be found to testify about terrorist conspiracies or the carrying out of violent crimes, British prosecutors have come to rely heavily upon convicted terrorists who turn state's evidence.

These informants are known in British slang as "supergrasses." Their testimony, no matter how plausible in its details, is always somewhat suspect since they do not come to the witness stand with clean hands.

Notwithstanding these and other unavoidable compromises, British judges working in Northern Ireland have striven, with a few notable exceptions, to maintain the high standards of their profession.

Cases involving supergrasses have sometimes been thrown out because judges found their testimony unconvincing, or because the weight of the evidence would not sustain a conviction.

These parochial concerns of Northern Ireland justice have now come before the US Senate. In June, diplomatic representatives of the American and British governments signed a supplementary treaty amending the agreement on extradition between the two countries.

The existing agreement provides, as extradition treaties normally do, that individuals accused of "political offenses" might be exempt from being extradited from the United States back to the country where the offense was allegedly committed.

What is a political offense? Interpretation of this term has always been left to the US courts to determine on a case-by-case basis, depending on the facts of each situation.

The proposed treaty with Britain would drop this political-offense exemption. In part, the proposed language is unexceptionable. It would tighten enforcement of international

conventions signed by many nations to cope with airplane hijackings, the seizure of hostages, and attacks on diplomats.

But the treaty goes beyond those crimes against international order and adds a long list of other crimes, including murder, assault, manslaughter, kidnapping, the illegal use of explosives and firearms, and "an attempt to commit any of the foregoing offenses."

What is at stake here is an effort by the British government to bring the legal resources of the United States government automatically into play in Britain's behalf.

British prosecutors have long been nettled that individuals suspected of crimes connected with the Northern Ireland situation could escape to the United States and claim immunity from extradition because their alleged offenses were political.

Britain has overreached itself. Factually, very few cases of this kind have arisen. Symbolically, the treaty would make for an unfortunate identification of the American judiciary with the unavoidable shortcomings of the Northern Ireland court system.

Mayor Raymond Flynn is surely right in saying that the United States ought not "to embrace, in effect, the fundamentally flawed criminal justice system in Northern Ireland."

If the United States were to become automatically involved in the administration of justice in Northern Ireland, it would have to question some British actions there. The forces of government can also engage in a kind of terrorism.

As recently as 1979, the European Court of Human Rights found Britain guilty of "inhuman and degrading treatment" of prisoners in interrogation centers in the North.

Britain has reformed those practices, but the United States cannot risk being identified with them. As Flynn told the Senate Foreign Relations Committee, "Both forms of terrorism must stand condemned by our government, and none must be given quarter, no matter who the perpetrator or excuse rendered."

Northern Ireland is at bottom a problem of politics, not jurisprudence. If Britain is to solve its political problem in the North, it needs to turn not to the United States but to its nearest neighbor, the Republic of Ireland.

sdlp

“Justice” in Northern Ireland

A discussion paper adopted by the
SDLP's 14th Annual Conference, January 1985

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INTRODUCTION

In this discussion document the SDLP has considered in depth several aspects of the law and legal process in Northern Ireland. This study is not intended to be yet another academic or scientific analysis, but a considered and serious view of the law and legal process from an SDLP perspective, based on the previously published studies of legal researchers and the experience and thoughts of those professionally involved in the law throughout Northern Ireland.

The inspiration for this document arose out of the need to express in a tangible fashion the continued alienation of people in Northern Ireland from the legal process. This paper explores that theme. Alienation has now become a fashionable term but because of over-use could become a cliché. This document will do much to prevent that happening and serves to illustrate in very stark and telling terms the real meaning of alienation from the legal process and the law.

The issues discussed are many and wide, but are by no means exhaustive. They range from Bail to Supergrasses, Plastic Bullets to Street Names. There are three sections. One, an examination of the way the law itself has been stretched to a point beyond reasonable toleration in any normal democratic society, thereby creating a most dangerous and explosive alienation within our own society. Two, an examination of the so-called safeguards, institutional and otherwise, of the law, such as the Police Authority and the Director of Public Prosecutions. In this section it is shown that these "safeguards" have been proven to be, in the main, either bogus or inadequate, failing to prevent abuses and further alienation. The final section deals with legislation and practices which have created alienation and brought the law into disrepute.

It is hoped that this document will contribute much to the present discussion of alienation and provide a realistic analysis for a fundamental reappraisal of the law and legal process in Northern Ireland.

Finally, those in the SDLP Lawyers Group who contributed to this document deserve the Party's thanks and continuing support. One hopes that this will be the first of many productions and wishes the Group every future success.

SEAMUS MALLON

SDLP Deputy Leader and Spokesperson on Justice.

TABLE OF CONTENTS

Page One 1. STRETCHING THE LAW

Page One	The Emergency Provisions Act.
Page Two	Bail.
Page Two	Excessive Remands - Judicial Internment.
Page Two	Access To Solicitors.
Page Three	Evidence and Burden of Proof.
Page Four	Supergrasses - A Further Bending of The Law.
Page Four	Prosecution of Members of the Army and Police for Serious Offences.
Page Five	Plastic Bullets

Page Seven 2. "SAFEGUARDS"

Page Seven	The Judiciary.
Page Seven	The Director of Public Prosecutions.
Page Eight	The Coroner's Court.
Page Nine	Inquiries.
Page Ten	The Police Complaints Procedure.
Page Ten	The Northern Ireland Police Authority.

Page Eleven 3. LEGISLATION - ALIENATION THROUGH LEGISLATION AND PRACTICES

Page Eleven	Disorderly Behaviour.
Page Twelve	Street Names.
Page Twelve	The Ethos of The Court.
Page Fourteen	Notes and References.

Section One

STRETCHING THE LAW

The Emergency Provisions Act

Northern Ireland has since its inception been governed by 'emergency' legislation designed to control crimes of violence arising out of political unrest. The Civil Authorities (Special Powers) Act 1922 was renewed annually until 1928 then given a five year currency until 1933 when it became a permanent legislative fixture. It was repealed in 1973 by the Emergency Provisions Act which was designed to replace the Special Powers Act without abandoning its basic elements. The Act and subsequent amendments were consolidated in the Emergency Provisions Act (NI) 1978. This Act and the Prevention of Terrorism (Temporary Provisions) Act 1984 are now the main body of legislation governing all offences arising out of the troubles in Northern Ireland. These offences, murder, kidnapping, explosives, membership of illegal organisations are all listed in the 1978 Act as "scheduled offences". It speaks volumes for the stability and acceptability of the Northern Ireland state that the only way in which it could survive was by the creation and implementation of repressive emergency legislation even until the present day. The law in Northern Ireland therefore has always been tainted by the existence and use of emergency legislation. This is a dark and all-prevailing cloud that has continued to threaten and darken the administration of justice in Northern Ireland throughout its history.

The Emergency Provision Act, as seen above, is the successor to the previous notorious Special Powers Act and differs little from it in reality. It contains wide powers of arrest for the army and police (section 11, 13 and 14) as well as the power to stop and search without having to arrest (section 18). It also shifts the onus of proof from the Crown to the accused in cases involving possession of firearms, ammunition, or explosives found on premises (section 9). This has the effect of reversing the normal presumption at law that a person is innocent until proven guilty.* In short, the powers granted to the RUC and army under the Act are what one former British Attorney General, Sir Peter Rawlinson, referred to as 'draconian measures'.

However, it is in its institutional changes that the Emergency Provisions Act has had its most frightening influence. Under Section 7 the accused's right to a trial by jury is removed so that he has to be tried by a Judge sitting alone. The abolition of the Jury since 1973 has meant that Judges have had to act alone and pretend to themselves and the public at large that they are carrying out both the functions of a Judge and Jury. The absence of juries for so long has led to an obvious reduction in the numbers of those being acquitted and an evident "case hardening" among the Judges. The jury in any normal system of justice in the Common

Law world is a vital refreshing public influence which continuously transfuses new life into the administration of justice. This is what the legal process lacks in the Diplock Court system. What is more disturbing is that the institution of non-jury courts now appears to be a permanent feature of the legal system in Northern Ireland. What was once presented as merely a temporary emergency measure seems now to be a permanent fixture with no likelihood of replacement. This more than any other institutional change has reduced the quality of justice for, in its very existence, it has reshaped or more accurately distorted the judicial process in Northern Ireland.

Not only has the court been reshaped by the E.P.A. but also so has the pre-trial process and the trial itself. The Bail system* has been changed again for the worse. The pre-trial procedures such as the committal proceedings have been made into mere formalities. The standard regarding the admissibility of statements* by accused persons has been lowered by Section 8 of the Emergency Provisions Act. This section allows all statements of admission to be admissible unless they are obtained by torture, inhuman, or degrading treatment. Formerly it was sufficient for a person to be made promises, offered inducements or threatened, to render a statement inadmissible, a much higher and laudatory legal standard. Again this has affected the quality of the standard of justice in trials in Northern Ireland.

The ultimate power retained in the Emergency Provisions Act is Section 12, which, although unused since 1975, is still dormant in the Act. This section is the provision that allows the detention without trial of persons suspected of being terrorists by the Secretary of State. Instead of using this power the government has concentrated its efforts on processing suspects through the court system in a manner which, as we have implied above, has seriously distorted and damaged the legal process. It should be remembered however that the power to intern without trial is an option which has only been temporarily excluded from use by the powers that be and can be reintroduced at any time.

The Emergency Provisions act, therefore, has been fundamental in reshaping and distorting the legal process in Northern Ireland. However, its existence merely reflects the State's need for such extraordinary powers in order to maintain law and order in a society so divided by the very existence of the State itself and so lacking in the natural resilience and strength arising from internal political consensus that without such powers it could not survive.

The obvious lesson from the above and subsequent analyses is, as Mr. Dermot Walsh¹ so succinctly puts it, "the criminal process should not be relied upon to resolve essentially political problems"

* See section on "Bail".

* See section on "Evidence".

* See section on "Evidence".

Bail

The practice of Bail is a legal process whereby an unconvicted person may apply to be released from custody during the period he is awaiting trial.

There is at common law a qualified presumption of innocence in favour of a person who is pursuing an application to be released on Bail. However under S.2(2) of Emergency Provisions Act the onus² is on accused to prove that he will comply with any conditions the court specifies, will not interfere with any witnesses, and will not commit any offences should Bail be granted. The position in England is the reverse under the Bail Act (1976).

The withholding of Bail should not be deemed a punishment. The main requirement in a Bail Order is primarily to secure the attendance of the Defendant at his trial when it is listed. It is also of prime importance that the Court of its own volition should be alert as to the probability of keeping the Defendant in custody or releasing him on Bail. This is a sure test of the Court's concern for prisoners who are not yet tried. In "crime ordinary" Bail applications, which normally are heard in Magistrates' Court, the system works reasonably well.

Since the introduction of the Emergency Provisions Act, the British replacement of the Special Powers Act (1922), the power to grant Bail in scheduled cases is the responsibility of the High Court. Such cases are the serious acts with which we have all become familiar (i.e. possession of firearms, possession of explosives, bombing, arsons and hijacking etc.) The process in such cases is slower, more detailed and subject to greater scrutiny. Grounds for seeking Bail in these circumstances normally consist of such factors as will the applicant turn up for trial; will not interfere with witnesses; show that he has a clear record, compliance with conditions and guaranteed sureties and so forth.

It would appear that police³ in these cases have an inordinate influence on whether the Judge grants or refuses Bail. The Barrister for the Crown clearly depends on Police reports, favourable to the applicant or otherwise. More often than not there would appear to be some abuse of the system at this stage, for example, if a person is charged with the possession of firearms and no other offence, it is not unusual for the Crown Barrister in outlining the facts to add ex parte that the applicant is suspected of being a member of an illegal organisation (alleged by R.U.C.) even though he is not charged with such an offence. Judges tend to accept such ex parte statements and decide adversely that Bail should not be granted. It is regrettable that certain Judges are more prone to accept such unfounded statements than others. In these circumstances Bail becomes the gift of the Judge, even though the applicant appears to have a good case. It is not difficult to divine what the attitude of these Judges will be in reaching a decision whether to grant or withhold Bail. It is significant that some Judges preside in fewer Bail cases than others.

It is generally accepted that the police, for example, will be more inclined to oppose Bail applications from Republicans than from loyalists.⁴ This is unjust. It is also apparent that when Bail is granted the conditions are sugared with minor restrictions to take "the bad look" off the decision. An example of this is the imposing of "curfew" on the applicant, i.e. remaining indoors from 9 p.m. - 8 a.m. The question of granting Bail will often turn on whether or not the Defendant has co-operated with the Police by making or withholding statements which are helpful to them, perhaps, in other cases.

Excessive Remands - Judicial Internment?

This system is probably the most pernicious that could be devised to imprison people without trial.⁵ Often people are imprisoned for periods of up to 18 months or 2 years.⁶ This is a scandalous abuse of the legal system. It is a well known legal maxim that delayed law is bad law because people's recollection of events becomes clouded with the passage of time. In Scotland, for example, an accused person, if he is in custody, must be tried within 110 days and if he is not so tried the Procurator Fiscal must make an application to the court for an extension of time and cogent reasons must be furnished before a Court will interfere with the rule and practice.

The privilege of the individual to seek Bail is of the utmost importance in safeguarding his liberties. For that very reason the practice of the Bail system with regard to juveniles underlines the concern the Courts have for young offenders. Every facility is afforded to the young offenders and, by and large, Bail will be granted to the young person much more readily and with less red tape than adults. Certainly, in the present situation in order to avoid injustice and the compounding of bad law practices, the practice of 110 days maximum remands is of absolute necessity.

Access to Solicitors

Another matter which militates against the acceptance of the legal system here is the question of access by Solicitors to clients on remand. The relationship between Solicitors and clients has been sacrosanct for very many years. That understanding has been eroded since the introduction of the Emergency Provisions Act. Very often police will insist on being present while Solicitors are interviewing clients. The Bennett Report's proposals, which were brought into being to protect the rights of private citizens are also being eroded. Very often the police themselves are in breach of the recommendations made by Bennett, for example, they may refuse a request by a suspect to see a Solicitor and will deny that any such request was made. In many cases access to a client is conditional on whether or not the suspect has made a statement of admission. It is only after 48 hours that he is allowed access to a Solicitor and only then when he asks for a particular Solicitor. Even this 48 hour period has been refused.

Both Judges and Prosecuting Counsel are all too ready at times to set aside the recommendations of Bennett and other well disposed bodies and

organisations when it suits their purpose. They say when it suits them that Bennett does not have the force of the rule of law.

Evidence and Burden of Proof

One of the basic tenets of any fair system of criminal law is that a person is innocent until proven guilty. A clear burden of proof rests on those prosecuting. In common law jurisdictions one of the primary objects of the rules of evidence is to ensure that this burden is fulfilled. Only relevant and admissible evidence can be presented when establishing a person's guilt.

In Northern Ireland the consensus necessary to create and enforce law and order does not exist. A substantial section of the population does not accept or support the authority of those who make and enforce the law. Rather than recognise this, the authorities have sought to create the impression that all is normal and that the law can adequately deal with our present conflict and its manifestations. Thus they have attempted to apply the full panoply of the legal system as part of their strategy for a 'military-type' solution to a political problem. By so doing the rules of evidence taken over from many jurisdictions have been adapted and modified. This has ensured the maximum number of convictions for politically motivated (and frequently non-politically motivated) crime. As a result the legal system has been discredited and the determination of nationalist people to withhold their consent has been reinforced.

A startling topical example of this has been the so-called "strawgrass" system. In common law uncorroborated evidence of an accomplice is considered as unreliable and unsafe evidence upon which to base a conviction. Yet in Northern Ireland over one hundred are detained awaiting trial and about 80 have been convicted on the strength of this type of evidence, (discussed separately).

It is within the whole structure of the Diplock courts that the rules of evidence which protect an accused have been modified to the extent that it can now be argued that the burden of proof has been substantially and dangerously changed. Disregarding the social and political background of the judiciary in Northern Ireland*, it is surely clear that it will take more to raise a doubt in the mind of a single judge than in a jury of twelve ordinary men and women. Indeed there is considerable evidence of case hardening among judges. In 1981 the acquittal rate for contested cases in Diplock courts was 33 per cent, in 1979 35 per cent, in 1976 35 per cent and in 1973 59 per cent. This is contrasted by an increase in acquittals in jury trials over the same period. This is hardly surprising since the evidence in most cases is very similar, the main focus of the trials being the conflict of evidence between the police, who appear in the court regularly, and the defendant. It is perhaps not surprising given the reputation and the "professionalism" of the police that judges should become increasingly sceptical of the same defence and more 'open' to the prosecution's case. This is much less likely in a jury system.

* See section on judiciary.

A further problem with cases being heard by a single judge is that one person is the arbiter of both fact and law. This can be particularly damaging when prejudicial but inadmissible evidence is introduced in a trial (e.g. a defendant's previous record). If such evidence is introduced in front of a jury, the jury is discharged and a new one sworn in. In a Diplock case, however, the judge will continue to hear the case but 'disregard' the prejudicial evidence he has heard - a feat of great mental agility indeed! This is particularly relevant when the defence (as is frequently the case) is challenging the admissibility of an alleged confession. It is also a very real problem because of the law relating to committal proceedings. Before a case comes to trial a Resident Magistrate must decide whether the Prosecution has a *prima facie* case. This can be done by way of Preliminary Investigation (PI) which involves the giving of oral evidence by police witnesses or by way of Preliminary Enquiry (PE) which involves the serving of written statements upon the accused. At common law an accused can insist upon a PI but under the Emergency Legislation (S2 1975 Act now contained in S1 of the 1978 Act), a Magistrate must proceed by way of PE if the prosecution requests unless it would be contrary to the interests of justice to do so. In effect this reduces the opportunities for the defence to challenge the prosecution case and makes committal proceedings a mere formality. However it also increases the risk of inadmissible and prejudicial evidence being taken into account at the actual trial since committal papers will be read by the trial judge. Indeed such a practice should be stopped except where a person pleads guilty in a non jury court.

The most striking feature of all the changes that have been made is the one relating to the admissibility of the alleged confessions. The importance of confession as proof of guilt in Diplock cases cannot be overstated. In a survey conducted in 1981 by Dermot Walsh it was shown that 53 per cent of defendants in the Diplock Courts pleaded guilty to all charges and 33 per cent pleaded guilty to some. Of those who did so 93 per cent had made confessions. Of the contested case the admissibility of a confession is frequently the sole issue of the trial. It is fair to say that confessions are the most important factors in convictions in the Diplock Courts.

At common law a confession of the accused is not admissible in evidence against an accused unless it is made "voluntarily". The onus is on the prosecution to prove beyond reasonable doubt that a confession statement is voluntary. However by reason of S8 of the E.P.A. 1978, in Diplock cases a confession will not be excluded unless the defence raise *prima facie* evidence of torture or inhuman or degrading treatment and the prosecution proves it was not so obtained. This has two effects. Firstly it means that in practice a defendant has to give evidence first to establish his case, unlike common law where the prosecution goes first. This is an obvious disadvantage to the accused. Secondly, and much more importantly, it means that there is a different test for what is admissible. What would previously have been ruled out is now acceptable since the test is more onerous on the defence. All this is at a time when there is greater need for the protection of an accused's rights given the particular importance of confessions in obtaining convictions in the Diplock Courts and given the real concern about R.U.C. and

Army interrogation methods (discussed elsewhere). Indeed in the case of *R. v. McCormick* it was stated by McGonagle L.J. re S.8 that "it appears to accept a degree of physical violence which could never be tolerated by the courts under the common law test". This was impliedly rejected by Lowry L.J. in *R. v. O'Halloran* but nevertheless it was recognised that 'involuntary' statements could be inadmissible. Whilst the authorities tend to be confusing it is clear that the *raison d'être* of the legislation and its subsequent interpretation is to loosen the hands of the police in their methods of interrogation and to allow in what would previously have been disallowed.

Supergrasses - A Further Bending of the Law

There is little doubt now that the decision to use supergrass evidence was a high level government decision involving the police, army and security experts. The government's suggestion that the emergence of supergrasses was a spontaneous happening is palpably untrue.

The main argument against the use of the supergrass in essence is that the motives for telling lies are so numerous that nothing he says can be considered reliable. The supergrass will seek to maximise the number of people involved in alleged crimes; he will play down his own role; he will implicate people he believes to be guilty; he will take revenge on those he dislikes by involving them in criminal activities; he will seek to please the RUC and tailor his evidence to their stated or presumed needs. False evidence can be manufactured by the police to implicate those they believe are guilty. The granting of immunity from prosecution and the advancement of large sums of money is offensive to all right thinking people. The idea of one judge sitting alone and making an infallible assessment of the supergrass's evidence is stretching judicial scrutiny to unreasonable limits.

There have been several supergrasses cases to date⁷ and one in the pipeline⁸. Except in the most ridiculous of cases (e.g. Grimley) there have been wholesale convictions of the majority of defendants in these cases. By contrast, the English history of supergrasses in the 1970's is interesting in that the opposite has happened in so far as there has been a very high level of acquittals. These, of course, were trials on front of a judge and jury. Those trials where there were convictions were trials in which the supergrass's evidence was corroborated. Lord Gifford Q.C.⁹ has concluded that there is no case in which it is clear that a person has been convicted on the evidence of a single supergrass without corroboration from any other testimony. The effect of this has been the discontinuance of the use in practice of supergrasses by the English authorities.

Over the centuries, recognising the dangers of injustice, the courts have attempted to introduce a safeguard, where an accomplice gives evidence for the prosecution, it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated. Corroboration means independent evidence which

affects the accused by connecting him with the alleged crime. The situation is particularly poignant in Northern Ireland where the single judge sitting alone as both judge and jury 'warns' himself of the danger of convicting upon such uncorroborated evidence. This is a somewhat unreal mental operation as Lord Gifford Q.C. in his impressive study has pointed out. Indeed the ordinary observer must be aghast at the absurdity of this form of mental gymnastics. Truly this is Kafka's surreal world come to life. In the case of a judge sitting alone, the danger of a mistake is in our view too enormous risk for one fallible human being to take. The personal warning is an artificial device which does not stand up to scrutiny. In general the use of supergrass evidence has had the effect of discrediting the judicial system in Northern Ireland even further and is yet another cause of alienation of both Catholic and Protestant people from that system.

Prosecution of Members of the Army and Police for Serious Offences

At the present moment this is perhaps the most serious problem in terms of the judicial system retaining its credibility as a genuine system of justice.

We have already referred to the failure of the D.P.P. to prosecute many incidents of complaints of police maltreatment of persons in custody¹⁰. Similarly the D.P.P. has constantly failed to prosecute soldiers for ill treatment of civilians during the course of their duty. Often in the few cases where the D.P.P. has initiated prosecutions against members of the Army and police there has been excessive delay in bringing charges against the accused.

But the most worrying feature of all is the nearly 100% acquittal rate in contested cases against members of the security forces. In the Boyle, Hadden and Hillyard study¹¹ of all contested cases involving security forces there was 100% acquittal rate. Of seven cases there were five against police officers and two against soldiers. The only logical and reasonable explanation that one can come to, as the above study in fact concluded, is that the courts or the prosecuting authorities adopt a different approach to such cases. Their explanation is that a higher standard of proof is effectively required to rebut the general presumption that policemen and soldiers are more trustworthy than those who make complaints against them.

Indeed the position since that study has not improved, but has got worse and has brought in its train a series of "shoot to kill" incidents which are highly disturbing and dangerous¹². In addition to these most disturbing incidents, the majority of which resulted in no prosecution of the security forces who were involved, there have been a large number of fatal incidents involving the use of plastic bullets. Once again no prosecutions have resulted, yet the majority of incidents involved the deaths of young children or women innocent of any established riotous or terrorist involvement.

During 1983 17 people, only some of them armed, were killed by British army and RUC personnel. Only 13 members of the security forces were charged in connection with 7 of these killings. Many of those charged were only charged after considerable delay and their trials have been similarly slow in getting to court. Most of these incidents were under the loose category of "shoot-to-kill" and have attracted substantial attention within the community. The failure of the courts to convict a soldier or police officer arising out of these "shoot-to-kill" incidents (other than Private Robert Thane over the killing of Thomas Reilly) has had a deeply disturbing effect on moderate nationalist opinion, which was initially at least comforted that elementary justice had been satisfied with these prosecutions being brought in the first place, but false hopes were raised by these prosecutions.

The subsequent ritual of prosecution and inevitable acquittal members of security forces for these killings has dissipated confidence in the judicial process and caused manifest anger and outrage. The fact that these trials were heard in non-jury courts, with the repeated appearances of the same judges in almost every case, gave rise to a serious questioning of the impartiality of the judiciary and whether in fact it was now legal for British soldiers or the RUC to kill civilians with impunity. In our view confidence in the impartial administration of justice is at an all time low.

The courts now seem to accept that young children, innocent third parties, joy-riders, paramilitaries, robbers and any civilian, be he innocent or guilty, may be summarily executed by a soldier, UDR or RUC man, who will subsequently receive an acquittal because he has made an honest but mistaken belief that the victim was a member of a paramilitary organisation.

Plastic Bullets

There can be no doubt that some of the most serious controversies in Northern Ireland since 1969 have concerned the use of excessive methods by RUC, Army and UDR in civil disturbance situations. When violence first flared the forces were permitted to shoot petrol bombers on sight but such was the outcry at the time that the authorities were forced to opt for the concept of minimum force.

This concept was designed to keep controversy concerning riot control method as quiet as possible to help build political support for security forces and their military methods.

The first weapons used were water cannons and purple dye but the main weapons were the plastic bullet, the rubber bullet and CS gas. They were mainly used to break up disorderly crowds. The rubber bullet was the favourite option between the years 1972 and 1975 but was replaced by the plastic bullet which was more accurate and therefore less discriminatory. The plastic bullet is four inches long, and an inch and a half in diameter and weighs some five ounces. It is made of PVC and, unlike its rubber predecessor, is fired directly at the target. Their use is governed by a code popularly known as the "yellow card" which is a

readily understandable set of rules which governs the use of the baton rounds. For example the card cites that the plastic bullet must not be aimed at any point of the body above the waistline. It is doubtful that if the plastic bullets were used solely in accordance with the "yellow card" instruction that anyone would have died as a result. Therefore it is logical to conclude that fifteen people, seven of them children, have died as a result of the improper and illegal use of this "minimum force" weapon.

The following table shows that the plastic bullet firearms have been used by the British Army and the UDR under Westminster administrations of all hues with deadly results:

Killed	Secretary of State	Chief Constable
Francis Rountree (11)	William Whitelaw	Sir Graham Shillington
Tobias Molloy (18)	William Whitelaw	Sir Graham Shillington
Thomas Friel (21)	William Whitelaw	Sir Graham Shillington
Stephen Geddes (10)	Merlyn Rees	Sir James Flanagan
Brian Stewart (13)	Merlyn Rees	Sir Kenneth Newman
Michael Donnelly (21)	Humphrey Atkins	Sir John Hermon
Paul Whithers (15)	Humphrey Atkins	Sir John Hermon
Julie Livingstone (14)	Humphrey Atkins	Sir John Hermon
Carol Ann Kelly (10)	Humphrey Atkins	Sir John Hermon
Henry Duffy (45)	Humphrey Atkins	Sir John Hermon
Nora McCabe (31)	Humphrey Atkins	Sir John Hermon
Peter Doherty (33)	Humphrey Atkins	Sir John Hermon
Peter Magennis (41)	Humphrey Atkins	Sir John Hermon
Stephen McConomy (11)	Humphrey Atkins	Sir John Hermon
Sean Downes (22)	Humphrey Atkins	Sir John Hermon

In addition to the above victims are some 60 people who are very seriously injured and over 200 badly injured by plastic and rubber bullets.

Apart from the use of plastic bullets against rioters on the Shankill Road during the Magilligan hunger strike and in Portadown in July, 1985, the army and the RUC have aimed their weapons solely at the Catholic and nationalist people of Northern Ireland.

There are several legal points to be raised concerning the use of plastic bullets.

* Prima facie to fire a plastic bullet at a person is to assault him - to commit a civil wrong against him and to commit a crime for which one is accountable to the State.

* Not all applications of force are illegal. Some of the most common forms of defence for assault are: misadventure, accidental injury, consent, lawful sport, lawful correction and finally use of force to protect persons or property and otherwise to keep the peace by lawfully appointed security forces and self defence.

* The legitimately armed security forces, charged by Government with keeping the peace, are in all respects as subject to the Rule of Law as are ordinary citizens, and this applies to the manner in which they use force which is, at times, their duty to use.

* The "yellow card" represents a legal explanation to the user of a plastic bullet firearm of the law governing its use. We may take leave to doubt whether all soldiers and policemen do understand the law in this regard and whether their commanders and political leaders care very much whether they do understand them or follow them if they do.

* There is confusion concerning the term 'firearm' in the "yellow card". Nowhere in the guide is it clear if the plastic bullet gun is included under the general term of 'firearm'. A firearm is currently defined in legal terms as "any lethal barrelled weapon from which any shot, bullet or other missile can be discharged". If the plastic bullet gun is not included under the term of firearm then it should be and the yellow card is nonsense. If the plastic bullet gun is included in the legal definition then it hardly deserves the title often given to it as a minimum force weapon.

* It is on the onus of the security forces who use the plastic weapons lawfully and in the course of their duty to prove that the force used was the minimum required and was reasonable and justified. The greater the ability of the weapons used to inflict injury the greater the onus of care is.

* The rules governing the use of rubber bullet guns prohibited the firing of a bullet directly at another in case severe injury resulted. The new code for the use of plastic bullets (which have a higher impact speed) insists that bullets are aimed directly at the lower half of the body. Again the question of the use of minimum force re appears.

* Circumstances are supposed to dictate what is a reasonable response to disorder. For example, if one is being shot at, it is presumed reasonable to return fire. Since the vast majority of rioters use sticks and stones the use of plastic bullets as a response seems to be an over reaction.

* Legally one is presumed to intend the natural consequences of one's actions. As the history of serious and fatal injury connected with plastic

bullets is so severe, the consequences must be to some degree intentional.

* It is a matter of considerable significance that in recent very vicious rioting by large mobs, including petrol bombers, in several large cities in England plastic bullets were not used. The British Secretary of State has been quoted (Irish Times, July 11th, 1982) as saying that plastic bullets are too dangerous to be used in the usual type of riot situation. If he was accurately quoted then no doubt he said it on the best legal advice.

The term "plastic bullet" is an attempt by the British authorities to trivialise the nature of this lethal weapon. "Plastic" is suggestive of a rather harmless light and safe material, reminiscent of a child's toy gun. This is a deliberate deception which was initially successful. But so appalling has been the catalogue of death and serious injury as a result of this weapon being used, that now the British authorities have changed their terminology and now call this weapon a baton round. This is yet another attempt at continued deception.

In conclusion it follows that plastic bullets should be banned in Northern Ireland. The lethal qualities of the weapon dictate that they should be scrapped as a riot control weapon consistent with the concept of minimum force. They should also be banned on the basis that the rules governing their use as summarised in the Yellow Card are clearly not followed by those who fire them and that those in ultimate control, the army and police chiefs and the politicians who favour their use, have not shown any resolve to remove those who misuse the weapons. Finally, the fact that over 40,000 plastic and rubber bullets have been fired over the past twelve years, many of them illegally with no redress from the judiciary, underlines the injustice of the situation. This, allied to the fact that some individuals have been successful in their claims for damages following injury by a plastic bullet, has clearly demonstrated that the security forces have effective free rein to do as they wish in regard to their use. The increase in community alienation that has resulted from this controversy proves that this is a most inappropriate military response to deep political problems.

Section Two

"SAFEGUARDS"

The Judiciary

In any state the judiciary occupies a central position in the political and social life of the system. In most Western countries the judiciary is subject to the concept of the "separation of powers", that is that the legislative, executive and judicial branches of the system will remain independent of each other and will not discharge each other's functions. There should be no duplication of personnel in these three branches of government and each can act as a check upon the excesses of the other. That is broadly a theory which applies to the government both of Britain and the Republic of Ireland. It is a theory which is rarely pure in practice. In Westminster and Dáil Éireann the Executive or Cabinet is drawn from the legislature. Similarly, political representatives in both countries may "progress" to become judges though they cannot hold both positions simultaneously.

In Northern Ireland, where a substantial proportion of the population has disputed the legitimacy of the State itself, the duplication of interest between the Unionist Ascendancy and the Northern Ireland Judiciary has had serious repercussions on the perception of the courts among the nationalist population. To most nationalists the judiciary has traditionally not been seen as independent of Stormont, but rather as another arm of the State - the Unionist Ascendancy. It was a view not without empirical evidence and one which we have inherited and which shapes attitudes to the present day.

"Of twenty High Court judges appointed since the independent Northern Ireland Courts were established, fifteen had openly been associated with the Unionist Party. Of twenty-three County Court appointments, fourteen had been visibly connected with the Unionist administration. At the height of the Civil Rights campaign of the late 1960s two of the three judges in the Northern Ireland Court of Appeal were ex-Attorney Generals in Unionist Governments, one of the four High Court judges was likewise an ex-Attorney General and another the son of an Attorney General, two of the five County Court judges were ex-Unionist MPs and another the son of an ex-Unionist MP, and among the twelve Resident Magistrates there was an ex-Unionist MP, an ex-Unionist Senator, a defeated Unionist candidate and a former legal advisor to the Ministry of Home Affairs". ("Law and State" by Boyle and Hadden).

It is an accusation levelled against judiciaries anywhere in the world that in enforcing the law they are influenced by their own political prejudices. There are few indeed who can set aside all bias and be totally objective. But in most countries the legal system had a counter to judicial prejudices in the form of the jury. The arguments for and against juries are as old as the jury system itself; suffice to say that "jury equity" can offset the excess of decision by a judge alone. It should be pointed out that in Northern Ireland juries too could be prone to total bias - one argument advanced for no-jury courts in the Diplock Report.

Of greater current concern is that fact that in the Diplock Courts a judge sits alone and it is in that sphere that 'political' overtones intervene in a way unequalled in these islands. It is here that many fear political bias, conscious or unconscious, will influence decisions. In many legal systems judges with political affiliations are generally acceptable in the Republic or Britain, for example - but there the very existence of the State and the institutions of the State are not in question. In cases where there are no juries a greater onus is thrust on the individual judge and there will inevitably be greater scrutiny of his decisions and beyond that even to his background and views.

Judges here, as in the Republic and Britain, are drawn from a narrow social stratum of society - that of senior barristers. They are appointed by the Lord Chancellor, who will usually act on the advice of the Lord Chief Justice. Once appointed they will hold office until they decide to retire and cannot be impeached while in office. Of the present judiciary 17 are drawn from the Protestant/Unionist tradition, only 3 from the Catholic/Nationalist tradition. This is hardly a balanced reflection of the community at large and reflects a situation practically unchanged since the foundation of the State.

The Director of Public Prosecutions

This office was set up in 1972 under the Prosecution of Offences (NI) Order 1972 as an independent procedure for the processing of serious criminal matters. It was in effect one of the achievements of the civil rights movement, as it was one of the movement's basic demands (i.e. to end biased prosecutions by the RUC).

As far as the ordinary processing of criminal matters are concerned, the DPP is seen largely as an effective, fairminded institution. Where criticism of

the DPP mainly arises is in its dealings with more contentious matters, such as the prosecution of the police or army against whom complaints have been made arising out of interrogations, shootings or incidents involving plastic bullets.

Here there is great concern and widespread criticism as to the failure of the DPP to demonstrate its fairness and prosecute security personnel. Delays in and failure to prosecute security forces are very serious and highly damaging to the credibility of an office designed to safeguard the community's interest at large, not to protect the good name or good standing of the police or army. The types of cases in this category range from the beating up of suspects in custody, to joyriders being shot by army personnel and shoot-to-kill incidents.

In these cases there seems to be an attitude of playing it safe and not prosecuting despite the effect this has on public opinion in an extremely divided society. In particular, the pattern of not prosecuting British Army personnel involved in the killing of civilians with plastic bullets has contributed and continues to contribute to the alienation of a substantial and increasing section of the nationalist population from the judicial system as a whole. This is a great disservice to the entire community. The failure to prosecute one soldier for killing even one child victim of a plastic bullet has created a deep and lasting fissure between the nationalist community and the administration of justice in Northern Ireland.

Because of this, the so called independence of the DPP is very much in doubt in the public mind in the nationalist community. An additional feature is that the DPP is directly responsible to the British Attorney General, who is a British MP and politician of the governing party. The Attorney General is answerable to Parliament and through him the DPP. This relationship between the DPP and the Attorney General is confused, unsatisfactory and shrouded in secrecy. It does nothing to inspire confidence in the concept of the DPP being an independent office free from political influences behind the scenes.

The Coroner's Court

A coroner's inquest is by law supposed to "inquire in unexpected, unexplained or suspicious deaths", (Coroners Act (NI) 1959), so that the full facts may be ascertained and to ensure that any necessary action is taken by the authorities to prevent similar avoidable deaths in the future. However in the North, these twin goals of an inquest are not achieved with regard to disputed killings, due both to the abuse of the system and structural weaknesses within it.

First, it is a feature of the system of coroner's inquests in the North that very long delays occur between the date of death and the date of inquest. The reason for delay is ostensibly the rule which requires a coroner to adjourn an inquest on the request of the RUC on the grounds that "a person may be charged with murder or manslaughter."

The delays caused by this rule have been

inordinate, particularly in disputed killings. During one period, of 152 inquests held, the average interval between death and the inquest was seven months. When we examine disputed killings the delay is much longer - the inquests into the plastic bullet deaths of Brian Stewart, Paul Whitters, Julie Livingstone, Peter Doherty, Stephen McConomy and others were between 14 and 18 months. Similarly with disputed shootings - the inquest into Tony Harper, shot dead by the UDR in Armagh, was adjourned eight times between March 1982 and May 1983. It is thus not surprising, but still disturbing, that no inquests have yet been held into the Grew/Carroll killings, nor the eight other men shot dead in disputed circumstances between November 1982 and March 1983.

It is clear that the DPP delays for an unacceptable period of time before pressing charges, even in those few cases where charges are pressed against the security forces in disputed killings. This contrasts sharply with, for example, the London police investigation into the shooting of Stephen Waldorf in January 1983, where charges were pressed within days of the incident. The other cause for delay is the coroner's agreement to "adjourn", even though he has the power to proceed with an inquest if "no-one has been charged within 28 days". There is, therefore, considerable evidence of deliberate delay, a fact alluded to by Lord Hailsham, the Lord Chancellor, when he disturbingly conceded in 1983 that there were indeed "legitimate policy reasons" for long delays in holding inquests in the North. It is reasonable to conclude that these reasons are not genuine, and serve to defeat the ends of justice. In any case, delay undermines any relevance an inquest may have.

This is also true given the range of 'findings' a coroner's inquest can make (natural causes, accidental/misadventure, died by his own act, execution by sentence of death and open). In most cases of disputed killings, an inquest returns an "open" findings, which covers a range of cases from murder to justifiable homicide. The advantage of this for the authorities is that, in cases where the security forces are involved, the most embarrassing and incriminating finding that can be made is the ambiguous "open" one!

This situation contrasts sharply with England and Wales where an inquest can return a finding of "unlawful killing", and where in a 1982 court of appeal decision, the principle of an inquest returning the appropriate finding "whatever the consequences of this may be" was upheld. In the North, this fundamental weakness means that in even the most disturbing plastic bullet death, an inquest can merely return an "open" finding.

Other weaknesses exist - currently no legal aid is available for inquests per se. Thus, families, friends and concerned groups as "properly interested" persons may not get the chance to investigate a death and question any witness, simply because they

are not able to afford legal costs. Also, it is up to the individual coroner whether or not he hears an inquest with a jury. In the North, juries at inquests are unusual which widens the powers of discretion of the coroner sitting alone and limits the role of the public (through a jury) in preventing a recurrence of the cause of death.

It is clear that the current powers and rules of coroner's courts prevent the proper investigation of the causes of disputed killings and the ensuing action taken to avoid recurrence. The continued tragedy of plastic bullet deaths and disputed killings confirms this. In addition, this institution is abused through inordinate delays and by other facts as suggested by the resignation of the Armagh coroner arising from "grave irregularities" in police files in disputed killings. In these ways, the accountability of the forces of law and order is not guaranteed. Coroner's courts are seen not as a means to address concern over disputed killings, but as a means of creating the belief of official sanction of them.

Inquiries

A procedure which has been used on four occasions over the past 14 years to defuse public concern over a particular event is "the inquiry".

Two were set up by the Stormont Government - the Scarman Tribunal examined the civil disturbances between March and August 1969, while the Cameron Commission inquired into the causes and nature of the violence and disturbances in the North during 1969. Neither inquiry gave legal redress or compensation to those who had suffered during 1969, but did produce recommendations aimed at reforming the state. History confirms that these reforms have not had their desired effect.

Two other inquiries occurred - the Compton Committee investigated charges of brutality following the introduction of internment, whilst "Widgery" examined the events of Bloody Sunday. Both record events and did not consider the pressing of criminal charges against any person or persons. Indeed, no-one was ever charged arising from these investigations and those responsible for torture, inhuman and degrading treatment (European Commission) or death on the streets were never charged. It is worthy of note that since "Widgery" there have been no inquiries into particular events or practices. Despite concern at the operation of emergency legislation, plastic bullets, shoot-to-kill, supergrasses and the range of other institutional abuses, no government sponsored inquiries have occurred.

Rather, government inquiries have examined issues with the sole aim of making recommendations on how to improve the system of interrogation (Bennett); the Emergency Provision Act (Baker); the criminal courts and terrorism (Diplock) and the

operation of the Prevention of Terrorism legislation (Shackleton and Jellicoe). The other major inquiry was the Gardiner Committee which investigated provisions and forces to deal with terrorism in the context of the preservation of civil liberties and human rights, while "accepting the continuing need for legislation against terrorism."

A number of conclusions can be drawn from the use of inquiries. Firstly, since the early seventies, no inquiry has been summoned to investigate the causes of the present conflict, or any particular part of it. This is consistent with the inability of the British Government to address in any serious way the fundamental causes of the conflict, and highlights its treatment of symptoms in a shortsighted and oppressive way.

Secondly, the inquiries which have been called examine the operation of emergency laws not with a view to abolition but, rather, amendment. Emergency laws are thus institutionalised, form part of the "normal" operation of the law and reflect the belief that there can be legal and emergency means to address the political problem of the North.

Thirdly, no inquiries have been called into incidents involving the security forces, even though there have been repeated public calls for investigations into numerous incidents. This not only reflects the concern of the government that the findings may prove incriminating and embarrassing but also the influence of the loyalist majority which rarely supports calls for inquiries. It is for this reason also that any future inquiries into the operation of the law are unlikely to produce any major moves towards dismantling the emergency laws and apparatus, given that loyalist calls are invariably for the strengthening of this process!

In theory, inquiries can provide a means to voice public concern about disturbing incidents. The practice in Northern Ireland falls short of this theory - not only are no inquiries called into the fundamental causes of conflict or into incidents which would embarrass the government and the institutions of the state, but also the inquiries which are summoned play down or ignore the political causes of the conflict and concentrate on legal means as a primary means of dealing with the reality of a divided society. This fact makes all the more remote the prospects of a genuine settlement to the conflict, but adds weight to the conclusion that the British government's role in Northern Ireland is not as "honest broker" or "peacemaker", but as a crutch for the loyalist majority and as guarantor and maintainer of legal and military means to address a political crisis with little attempt at political analysis and initiative.

The Police Complaints Procedure

The Police Complaints Procedure is the formal system for investigating disciplinary complaints against the police from members of the public. It is an institution supposed to guarantee the accountability of the police, but does not.

The first and most fundamental reason is that the RUC themselves investigate complaints. Given the deep rooted mistrust and hostility to the RUC from the minority community, it is naive to believe that the RUC investigating themselves will be seen to be, or will be, impartial. When no-one, for example, was even prosecuted for ill-treatment of prisoners during interrogation in the 1970s, and when the RUC continue to behave in a brutal and sectarian way, it is difficult to believe that this complaint procedure could ever conceivably be acceptable.

The second defect, of a more technical nature, is known as the "double jeopardy rule". This asserts that a member of the RUC will not face disciplinary charges where he has been convicted or acquitted of a criminal charge which is substantially the same as the disciplinary offence. In addition, a 1977 Home Office circular advises that when the DPP does not even prosecute, then if the disciplinary offence is substantially the same as the criminal one, there should be no disciplinary charge. Given that the DPP in the North is sent all complaints involving an allegation of a criminal offence against the RUC, however trivial, the RUC can avoid disciplinary investigations if the DPP does not press charges in any case of a serious or minor nature, or if the member of the RUC has faced charges and been acquitted or convicted. This is why even the Bennett Report, given the number of allegations of ill-treatment during the seventies, expressed surprise that not one disciplinary proceeding has been brought against any member of the RUC.

The reality is that the complaints procedure is so structured that few complaints are investigated, and even then by the RUC themselves. It adds further ridicule to this procedure that there is a marked failure to find a significant proportion of complaints substantiated. Though statistics released by the Chief Constable are not definitive, in 1980 1% of cases were upheld, 6.5% were upheld in 1981, and 4.5% in 1982. These are not the sort of success rates that encourage complaints or belief in the complaints procedure.

As a response to the foregoing analysis, an independent Police Complaints Board was established in 1977. However, its role is severely compromised by the fact that it becomes involved only after the police have completed their investigation; it too is a captive of the "double-jeopardy" rule, and in any case it rarely avails of its power to direct the Chief Constable to prefer charges as it may specify. In the final analysis, a proper complaints procedure presumes and depends upon the state having confidence in the legitimacy of the actions of its police force.

The Northern Ireland Police Authority

The Police Authority was created in 1970 and through its Complaints and Public Relations Committee has power to inform the public on police complaints procedure; to refer cases affecting the public interest to an independent tribunal; call for the resignation of the Chief Constable. In theory it is a real watchdog against oppressive police policies and practices.

Again, the reality is different. Throughout the early seventies, when local, national and international justice bodies were condemning the use of "the five techniques" during interrogation, the Police Authority remained silent. When eventually it did investigate a complaint of ill-treatment, it was two years after the complaint was made and was only taken up when a Police Authority member resigned to protest against the Authority's inaction. Eventually, when individual police members were subpoenaed to explain their actions (after the RUC Chief Superintendent had admitted that an assault had been occasioned on the complainant) the High Court refused to enforce the attendance of the RUC members at the tribunal hearing arguing that the tribunal was under no duty to act in accordance with the normal judicial process!

The charade of the Police Authority is revealed in its continued silence over the institutional abuses we witness today - plastic bullets, harassment, the use of deadly force, the use of arrest under Section 11 Emergency Provisions Act, surveillance, etc. The Police Authority is nothing more than an official smokescreen, aimed at suggesting that the RUC are controlled and are accountable, while in fact remaining mute on the day and daily oppressive practices of the RUC.

In the Police Authority, like other institutions of alleged control and accountability, we witness abuse, injustice, apology for serious crimes and silence on widespread wrongs. The failure of so many to achieve redress for abuse, and justice for wrong, has alienated many, not just from the forces of law and order, but also from the institutions of government and the state itself.

Section Three

LEGISLATION - ALIENATION THROUGH LEGISLATION AND PRACTICE

Disorderly Behaviour

Section 9, Criminal Justice (Miscellaneous Provisions) Act (NI) 1968 makes it a criminal offence to be guilty of any of the four following offences:-

(i) riotous behaviour; (ii) disorderly behaviour; (iii) indecent behaviour; (iv) any behaviour whereby a breach of the peace is likely to be occasioned; provided that any types of behaviour is witnessed taking place in (i) any street (ii) road (iii) highway or (iv) other public places; (v) in any place to which the public have access (whether as of right or by permission and whether subject to or free of charge); (vi) or on any premises where intoxicating liquor is sold.

Section 9 contains four separate breach of the peace types offences, except that in respect of the first three offences, there need not be implicit in them any breach of the peace occurring or anticipated. The offence of disorderly behaviour simpliciter has no equivalent in English law, either in statute or at common law. (There are in England a number of specific behaviour offences all of which require the occurrence of or the reasonable anticipation of a breach of the peace).

Disorderly Behaviour is something less serious than "any behaviour whereby a breach of the peace is likely to occur". The problem is: what is it? In England there is a wealth of case law explaining the types of behaviour constituting the fourth offence in Section 9 of the Northern Ireland Act. In other words, English case law relates directly to this particularly, but to none of the other three.

To understand what constitutes Disorderly Behaviour, one could look at Scottish or New Zealand law, as there is exactly the same offence in those jurisdictions. In general, behaviour which causes another mere annoyance or offence in a personal sense could amount to Disorderly Behaviour. Even where no-one is offended or disturbed in the slightest, the behaviour may be perceived as Disorderly Behaviour, even where there is no member of the public in the vicinity (as is the crucial requirement in England), provided that it occurs in some sort of public place.

In Northern Ireland, there is no generally accepted understanding among Magistrates as to what exactly Disorderly Behaviour really is. This is a summary offence, carrying a fine of not exceeding £100 or a prison sentence not exceeding six months or

both. There is a power vested in a police constable to stop, search, detain and arrest any person he reasonably suspects of being guilty of Disorderly Behaviour, by virtue of Section 25 (2), Criminal Justice Act (NI) 1953.

Obviously although Disorderly Behaviour in itself is a fairly mild summary offence, the police have an extraordinarily wide range of powers to stop and search a citizen, hold him up (how long is not stipulated), and even arrest him. Case law on the concept of lawful arrest stipulates that even where a police officer forms a wrong opinion about the acts of the Defendant, as long as he reasonably believes that the acts constitute a criminal offence, the arrest is itself lawful, even where there is not even a *prima facie* case against the Defendant.

So, if the police in Northern Ireland suppose that someone's behaviour is in their opinion offensive or even unmannerly, they may exercise these powers to the full, and if there is any evidence of the police having acted *ma le fide* the Defendant has the dubious right to sue the policeman in a civil action for wrongful arrest.

It is impossible to prove unreasonable suspicion on the part of the police particularly as there is no universal definition of the offence. For example, some Magistrates take the view that to say "Fuck off!" to a policeman is disorderly in itself and sufficient to satisfy a conviction. And yet, curiously, in England, it is not a criminal offence to use the most insulting and offensive language to a policeman as there would not be anticipated a breach of the peace, as policemen are considered to be a lot harder than the average citizen. In that situation there must not be members of the public nearby. Also it has been held in England that the word "Fuck" is no longer an offensive word, as it is used in everyday normal speech.

Further, one is not legally obliged to stop and answer any questions put to him by the police, until the police quotes his power to question outside of arrest, under various emergency powers. And, unless these powers are actually quoted, one may express one's refusal in any terms one likes, no matter how offensive. It is at this point that police in Northern Ireland can step in and stop, search, detain and/or arrest him for Disorderly Behaviour. In England, if a policeman were to use any mild force to detain someone without first explaining to him that he is under arrest, that policeman would be technically guilty of battery, if not assault. And, in that case, if the detained person were then to turn

around and elout the policeman, it has been held in the highest court in England that he would be perfectly correct so to have done in order to resist an unlawful arrest.

Happily, there are a number of "free thinking" Magistrates who consider that Disorderly Behaviour must be something akin to causing what could be reasonably described as a breach of the peace.

This is a much used charge by the RUC in Northern Ireland. Its elasticity in application, coupled with the additional statutory powers of stopping, searching, detaining and arresting, give the RUC an excessive power over the conduct and behaviour, both verbal and physical, of the ordinary citizen in a public place. There is reason to believe, not unexpectedly, that the police abuse this power and apply it excessively and arbitrarily. Many young people have been charged and processed through the courts in the most trivial of circumstances. There are grounds for believing that such an excessive police power invites abuse and can only lead to injustice, even of a minor kind. Injustice whether minor or major has the same result in Northern Ireland - alienation from the legal process.

One of the most serious consequences of having convictions even of this minor kind is that young people can come before the court with apparently long criminal records.

Once again we see in this fairly minor example of excessive statutory power for the police a characteristic repressiveness that is the unfortunate hallmark of the law in Northern Ireland and says much for the guiding principle on which this state was founded.

Street Names

Article 27 of the United Nations International Covenant on Civil and Political Rights reads as follows:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right... to use their own language."

This Covenant has been ratified by the United Kingdom.

Linguistically Section 19 (4) of the Public Health and Local Government (Miscellaneous Provision) Act 1949 is discriminatory and contrary to Article 27 of the U.N. Covenant.

Section 19 (1) of the Act reads as follows:

"The Council of a rural district may from time to time cause houses and buildings in any part of their area to be marked with numbers as they may think fit, and may cause to be put up or painted in a conspicuous part of a house, building or place at

or near each end, corner or entrance of any street in any part of that area the name by which the street is known."

Section 19 (4) of the Act reads as follows:

"Where... the council of a rural district exercise the power conferred on them by sub-section (1) of this section... with respect to the putting up or painting of the name by which a street is to be known, they shall not cause such name to be put up or painted otherwise than in English."

By Section 19 (2) of the Act it is an offence to pull down or deface any such number or name or to put up any number of name different from any number put up by the council. These powers have now been transferred to the Department of Environment for Northern Ireland.

The net effect and conscious intention of this sectarian legislation is to prevent the official and legal display of street names in the Irish language. It is interesting to contrast this repressive legislation with the liberality of the Welsh language legislation. This legislation is yet another example of the large body of statutes and regulations designed to preserve the unionist ethos of the Northern Ireland state and to repress the nationalist ethos where it is most likely to find expression (i.e. in the Irish language). Repression is the abiding character of much Northern Ireland legislation.

The Ethos of the Courts

As there is no political consensus in Northern Ireland many things are symbolic which otherwise would not be, e.g. the terminology by which judges and magistrates are addressed, i.e. "My Lord" and "Your Honour". To many in the nationalist community, such terms have a ring of British colonialism about them whereas in the Republic of Ireland, and nearly every other country in the western world, similar terms are used without problem. In Northern Ireland it would be better if judges and magistrates were addressed simply "Judge" and "Mr/Madam Magistrate" respectively.

The unionist ethos is symbolised in Northern Ireland Courts by among others the following, namely:

"GOD SAVE THE QUEEN". This phrase is used by the judge's tip staff in many courts outside Belfast at the start and end of hearings. It is by no means universal. (It is rarely used in Belfast and is not used in the High Court). There is no need for it to be used at all.

THE FLYING OF THE UNION JACK ON LAW COURT BUILDINGS. It is also unnecessary. The scales of justice is a dignified sign to designate a court.

ROYAL COAT OF ARMS. Every court has a crest of the Royal Coat of Arms. This is a very triumphalist crest even though the motto "Dieu et mon droit" (By divine right) is tame enough. These crests are certainly a relic of a colonial past and, some might say, symbolic of a colonial present. If there must be a crest, then one which denotes peace and tolerance would be more appropriate.

CROWN COURTS. The name should be changed in Northern Ireland.

THE OATH FOR JURORS WHICH REFERS TO THE QUEEN should be removed in order to delete all references to the Queen. This has recently been done in England.

DIVISION OF LONDONDERRY. The name Londonderry which at all times is identifiable with the Unionist ethos, is used to denote several courts in the north west of Northern Ireland. Ironically it would be inconsistent to simply change the name of the court district to "Derry". The term "North West" would be a good compromise.

REMEMBRANCE DAY. This is very sensitive. It would not be fair to the relatives of lawyers killed in the two world wars for such ceremonies in the High Court to be dispensed with altogether. However, the decking out of the main hallway of the Belfast High Court in Union Jacks in a tidy but explicit way, for at least a week, should not be permitted.

BOWING TO THE JUDICIARY. A lawyer is expected to bow to a High Court Judge, whether in or out of court, and to other judges in court. The practice should be abandoned as it stems from the tradition of bowing to the monarch and giving him allegiance. All such royal or monarchical customs should be dispensed with.

DIRECTOR OF PUBLIC PROSECUTIONS OFFICE AT LAW COURTS. This is a bad practice. The Director of Public Prosecution is meant to be independent from the police and the judiciary and should be seen to be.

ROYAL ULSTER CONSTABULARY AT COURTS. For obvious security reasons there is a very noticeable police presence at courts. However, as a substantial part of the national population feels alienated from the police, their presence in many instances transfers such alienation to the courts themselves. Even though it will always be necessary for police to attend courts to give evidence, perhaps it would be wise to have the courts and the judiciary guarded by a body which does not form part of the police or the army. Ironically, the relationship of such a body to the Police would in some ways be akin to the relationship between the Director of Public Prosecutions and the Police.

ROYAL ULSTER CONSTABULARY. Their name should be changed as an important initial symbolic gesture.

Do these symbols do any harm? Is removing them worth the trouble? Are we being tolerant and sensitive in wanting them to be moved? These symbols create a Unionist ethos in the courts. This affects not only the litigants but also the judiciary and court officials. Surely the answer to these questions is "yes" because the unionist population would have as much to gain as the nationalist. The removal of such symbols would go a long way towards restoring confidence in the administration of justice to the nationalist community. Thus there would be far more consensus of trust and respect in the administration of justice.

NOTES AND REFERENCES

1. Dermo  Walsh: 'The Use and Abuse of Emergency Legislation in Northern Ireland,' published 1983 by the Cobden Trust.
2. The Standing Advisory Committee on Human Rights has argued that this onus is inconsistent with the qualified presumption of innocence.
3. See Walsh op. cit. Walsh has shown that Judges pay greater attention to police objections than to other factors, such as evidence against the accused.
4. Boyle and Hadden: 'Law and State: the case of Northern Ireland' Published 1976 in the Law in Society Series.
5. 'Fortnight' Magazine April 1984. Steven Greer: 'Internment with a Judge's Stamp'.
6. In the House of Commons on 22nd March, 1984, the Northern Ireland Secretary, James Prior gave the following statistics:

322	persons were on remand for scheduled offences
91	persons had spent up to three months in custody
57	persons had spent up to six months in custody
103	persons had spent over six months in custody
5	persons had spent over twenty four months in custody
7. Bennett, Black, McGrady, Grimley, McGurk (refused to testify), Quigley, Morgan, Gilmore, Allen, Crockard, Gibson.
8. Kirkpatrick.
9. Lord Gifford 'Supergrassess'. Published 1983 by the Cobden Trust.
10. Of 826 complaints, it was decided to take no proceedings in relation to 801 complaints or 97%.
11. Boyle, Hadden and Hillyard. 'Ten years on in Northern Ireland: The Legal Control of Political Violence' Published 1980 by the Cobden Trust.
12. Incidents involving British Army/RUC 1978 to 1983.

26th February 1978	- P. Duffy
10th June 1978	- D. Heaney
21st June 1978	- Mulvenna, Brown, Mailey, Hanna
11th July 1978	- J. Boyle
30th September 1978	- J. Taylor
25th November 1978	- P. Duffy
23rd July 1980	- M. McCartan
14th July 1981	- D. Barrett
25th August 1982	- E. Bradley
29th October 1982	- R. Brennan
11th November 1982	- McKerr, Toman, Burns
24th November 1982	- M. Tighe
12th December 1982	- S. Grew, R. Carroll
27th December 1982	- P. Elliott
19th January 1983	- F. McColgan
3rd February 1983	- E. McGonagle
16th March 1983	- W. Millar
30th July 1983	- M. Malone

Department of Politics
 Mount Holyoke College
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 November 18, 1985

The Hon. Daniel J. Evans
 Committee on Foreign Relations
 United States Senate
 Washington, D.C. 20510

Dear Senator Evans:

At the October 22nd hearing on the U.S. - U.K. extradition treaty (transcript, pp. 116-118), you asked me about extradition practice within the United States. You characterized it as an executive decision; I agreed that governors decide for their states whether to surrender a fugitive, but thought the governor's decision was reviewable in the courts.

I have looked into the matter and it appears that we are both right. Article IV, section 2 of the Constitution provides:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Nothing in this provision requires that the requests be sent to, and decided by, the governor of the State to which the accused has fled. Thus, on a strict textual interpretation of the Constitution, the decision to extradite could be allocated to either the executive or the judiciary.

As you pointed out at the hearing, the decision to surrender is made today by governors. I believe that it should be made by courts, but, as I tried to suggest at the hearing, allocating the decision to governors is consistent with due process so long as judicial review of the decision exists.

You suggested that the decision is not reviewable; I thought it was, but our colloquy did not continue long enough for us to realize that we were talking past each other. Only afterwards did I realize that there are two decisions that we should have discussed: the decision not to surrender and the decision to surrender.

I was focusing on this second decision, and was suggesting that the practice of allowing governors to surrender fugitives to other states is defensible constitutionally because resulting injustices can be repaired, consistent with our federal and state constitutions, by the courts of the requesting state (and, in some instances, even by the U.S. Supreme Court).

In the international arena, this kind of judicial protection is not nearly so certain. Hence, in my judgment, there is need for careful judicial

scrutiny at the time the request for extradition is made.

However, I believe that you were focusing on the decision of governors not to surrender and asking whether that is defensible. I think it is defensible as a matter of due process, but indefensible as a matter of federalism.

As a matter of due process, I support legislation that would require that all foreign extradition requests be sent to the U.S. Justice Department for screening, so that improper requests could be denied as a matter of prosecutorial discretion. Then we would avoid embarrassments like the Barr case, which was put forward, I believe, for reasons that had nothing to do with due process.

As a matter of federalism, however, I do not believe that a governor may, consistent with Article IV, section 2, reject a meritorious request for interstate rendition. I also believe that such decisions should be open to judicial review and that an order in the nature of a writ of mandamus should be available from a federal district court to compel compliance with a proper interstate extradition request.

As I read the cases, the decisions of governors not to surrender are judicially reviewable and have been reviewed by the courts of their own states and, on original jurisdiction, by the U.S. Supreme Court. The language of the interstate rendition clause is clearly mandatory in form; a fugitive from justice "shall [be] delivered up" on demand and, in Kentucky v. Dennison, 24 How. 66 (1861), the U.S. Supreme Court declared that it was the duty of the governor of Ohio, on demand from the governor of Kentucky, to deliver up the fugitive. However, the Court refused to enforce that duty, calling it moral rather than legal.

The distinction was plainly specious and defied the ordinary rules of legal construction. The U.S. Constitution was not meant to be a hortatory document; it was meant to be law. However, the decision is understandable politically, as the case involved a fugitive slave from a border state on the eve of the Civil War.

Whether the Dennison decision would be followed today, say, in the case of an egregious refusal to surrender, is an interesting question. When Dennison was decided, there was no such thing as a declaratory judgment. Now that there is, and one has been issued against a President, I could imagine others being issued against governors declaring their duty to comply with Article IV, section 2. Failure to comply with the declaratory judgment could then clear the way for an order in the nature of a writ of mandamus.

In any case, the decision of a governor, unlike that of a president (or foreign head of state) not to surrender a fugitive, may be nullified by higher executive authority in a manner that triggers judicial review. This is so because Congress has chosen to make interstate flight to avoid prosecution a federal crime. 18 U.S.C. 1073. Thus, if a governor refuses to surrender a fugitive, federal authorities within his state can bring the individual to the bar of federal justice, convict him, and then surrender him to the state that first sought him. Thus it is probably incorrect, as a

matter of law, to say that a governor's discretion to shield interstate fugitives from surrender is absolute.

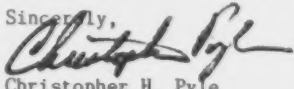
As a matter of practice, of course, it usually is, and there may be political wisdom in allowing this discretion to continue. We don't like to admit it, but not all states or municipalities in the United States have fair laws or just legal systems. That was true in the 1860s; it was true in the 1960s, and it is true in some areas even today. In allowing this discretion to continue as a matter of practice, we are saying, in effect, that justice may be served best by allowing governors inquire into the capacity of requesting American regimes to do justice.

A similar executive power is vested in the Secretary of State. I think that is a good idea, and would like to extend it in two ways. First, as I have mentioned, I would like to have it exercised early, by executive screening of foreign requests, rather than after courts have declared the individual extraditable. Second, I would like Congress to acknowledge the constitutional and inherent power of courts to make the same inquiry -- a power I base on the courts' duty to avoid complicity in foreign injustice.

When I argued that courts are better able to make this inquiry, because they are less subject than the executive to diplomatic and other pressures, you suggested that I may have understated the susceptibility of our judiciary to political pressure. Perhaps I did, but I hope you will agree that my characterization of the pressures on our State Department was not overstated, particularly in view of the way our government, on the eve of summit talks, handled a Russian sailor's inarticulate bid for asylum.

I hope this letter clarifies our exchange at the hearing last month. Thank you for your attention.

Sincerely,


Christopher H. Pyle
Professor

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October 28, 1985

Honorable Richard G. Lugar
Chairman, Committee on Foreign Relations
United States Senate
Washington, D.C. 20510Re: Supplementary Extradition Treaty Between
the U.S. and the U.K.

Dear Senator Lugar:

This letter is to follow up on two questions put to me by Senator Kerry during my testimony on October 22, 1985, which I committed to answer more fully. I would appreciate your including these further responses in the record.

Question: In how many instances have United States courts improperly denied extradition requests by the United Kingdom or other countries on the basis of the political offense exception during the last twenty years?

Answer: The Department of State indicates that Great Britain has submitted approximately 76 extradition requests to the United States since 1975. Records prior to that were not readily available. In four of those cases, the political offense exception was improperly applied by a magistrate or district judge to deny extradition. In Quinn and Doherty, appeals by the government are still pending.

In addition to those four cases, two older decisions have been criticized as improper applications of the political offense exception: the Andrija Artukovic case, 140 F.Supp. 245 (S.D. Cal. 1956), aff'd, 247 F.2d 198 (9th Cir. 1957) (extradition to Yugoslavia sought for ordering the murder of more than 200,000 persons in Nazi concentration camps); Ramos v. Diaz, 179 F.Supp. 459 (S.D. Fla. 1959) (extradition request by the Castro government for two Cubans convicted of murder who had escaped from prison and fled to the U.S.). For an examination of these cases, see Hannay,

SCHIFF HARDIN & WAITE

Honorable Richard G. Lugar
 October 28, 1985
 Page Two

"International Terrorism and the Political Offense Exception to Extradition," 18 Col. J. Trans. L. 381, 394-97 (1980).

The absolute number of times in which courts have erred in their application of the political offense exception is not the controlling factor in analyzing the need for the Supplementary Treaty. As I explained in my recent article in the Denver Journal of International Law and Policy:

It is not so much that the United States may well become a more attractive refuge for . . . terrorists, though that is possible. Rather, the danger lies in the impact of these decisions overseas. Recent U.S. court decisions have sent out a message to the world that the American judicial system accepts the notion that the end justifies the means and that political violence is an acceptable method of accomplishing political goals. These decisions appear to place a stamp of approval on, and thereby sanctify, terrorist activities of all kinds.

Further, as I indicated in my 1981 testimony before the Senate Judiciary Committee with respect to S.1639, "the magistrate's opinion in Mackin was widely circulated in Northern Ireland on behalf of the 'hunger strikers' in British custody who sought to be recognized and treated as 'political' offenders, thus inflaming an already tense situation."

Question: Are there any statutes in the United States which establish an offense similar to the one set forth in Section (j)(1) of Article 1 of Supplementary Treaty for "the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life"?

SCHIFF HARDIN & WAITE

Honorable Richard G. Lugar
October 28, 1985
Page Three

Answer: A brief and non-exhaustive search of state statutes has identified at least four U.S. offenses similar to Section (j)(1):

Ill. Rev. Stat. ch. 38, §24-1(a)(2) prohibits a person from "knowingly . . . carr[ying] or possess[ing] with intent to use the same unlawfully against another, a . . . dangerous or deadly weapon." A loaded firearm is defined as a dangerous weapon.

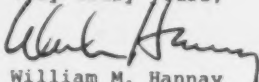
New Jersey Stat. Ann. 2C:39-4a prohibits the possession of a firearm with the intent to use it against the person or property of another.

Section 265.03 of the New York penal law states: "[a] person is guilty of criminal possession of a weapon in the second degree when he possesses a . . . loaded firearm with intent to use the same unlawfully against another."

Section 6-8-103 of the Wyoming statutes (formerly §6-11-101) makes it a felony for "[a]ny person [to] knowingly possess . . . any firearm . . . or any other dangerous or deadly weapon, or any explosive or incendiary apparatus, instrument or materials, with the intent to unlawfully threaten the life or physical well-being of another, to commit assault or assault and battery or to inflict bodily harm or injury upon the person of another."

If I may be of any further assistance, please do not hesitate to call or write.

Very truly yours,


William M. Hannay

WMH/jl

cc: Senator John Kerry

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November 12, 1985

Honorable John F. Kerry
United States Senate
Committee on Foreign Relations
Room SD-423
Dirksen Building
Washington, D.C. 20510

Dear Senator Kerry:

My replies to your questions regarding the United States-United Kingdom supplemental treaty of extradition are as follows:

1. In an article published several years ago in the Cornell International Law Journal, you concluded that the judicial model for determination of the political offense exception is the approach that best harmonizes the protection of political dissent with the punishment of "wanton violence". Do you continue to support that conclusion?

A. Yes, I continue to support the conclusion that the judicial model is the best approach for determining the facts involved in the application of the political offense exception. I also continue to believe, as I wrote in the Cornell International Law Journal, that the executive and the legislature have the obligation to define the political offense exception either by treaty or legislation. A restricted definition for the exception will, of course, reduce the scope of the courts' fact-finding.

Honorable John F. Kerry
November 12, 1985
Page Two

2. Please describe the role that would be played by the judicial branch under the supplementary treaty with respect to the political offense exception. Who would decide whether an offense fit within Article I of the treaty? On what basis? By what standard?

A. The supplementary extradition treaty will not alter the role of the judicial branch as the primary fact-finder with regard to extradition. The courts will continue to determine whether an offense is extraditable under the treaty. With regard to issues of treaty application such as dual criminality, the inquiry will be one of law. Concerning the factual predicate for extradition, the standard should continue to be probable cause.

3. Is possession of a firearm "with intent to endanger life" a crime in the United States? If not, how close a similarity must there be between a substantive crime in U.S. law and its foreign counterpart before the U.S. would extradite under the supplementary treaty?

A. Possession of certain firearms under certain circumstances is criminal throughout the United States. I am not aware of a statute that uses the precise language "with intent to endanger life," but I would not be surprised if some jurisdiction had

Honorable John F. Kerry
November 12, 1985
Page Three

such a law. Illinois, for example, criminalizes or enhances the criminality of the possession of certain objects in light of the intent of the possessor. Such crimes include possession of narcotics with the intent to distribute and possession of burglary tools.

In any event, there is substantial jurisprudence in the extradition field regarding the necessary similarity of crimes as defined by different sovereigns:

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. Collins v. Loisel, 259 U.S. at 312.

The consistent approach of the American courts has been to look at the actus reus that comprises the specific charge, rather than at the statutory description or name of the crime. If the deed itself is punishable in both jurisdictions, then the dual criminality rule is satisfied.

Honorable John F. Kerry
November 12, 1985
Page Four

4. If the British government seeks the extradition of an individual for possession of a firearm "with intent to endanger life," what input does the individual being sought have on the Court's determination that the principle of dual criminality is satisfied?

A. The individual being sought would be entitled to a hearing on the factual issues and would be entitled to submit briefs and argument regarding the issues of law.

5. If the supplementary treaty would enhance executive discretion regarding political offenses, what standards would govern its decisions? Would unreviewable discretion undermine the perception that we are an open and fair society? That we are a protector of human rights?

A. The supplementary treaty does not enhance executive discretion. The treaty limits the discretion of both the courts and the executive.

6. Do you agree that judicial determinations of the political offense exception may serve to shield the executive branch from embarrassment and political pressure?

A. Yes, I agree. This does not mean that the judiciary should have wide-ranging, unfettered latitude or that the executive and legislature should avoid

Honorable John F. Kerry
November 12, 1985
Page Five

providing a clear definition for the application of the exception.

7. What is your opinion of giving the judiciary a different role under different treaties? Does it undermine the perception of our judicial system? What benefit is there in letting close allies avoid the judicial system but submitting lesser allies to close judicial scrutiny?

A. The supplementary treaty with the United Kingdom does not give the judiciary a different role than it has under other treaties, although the new treaties with Mexico and Columbia, I believe, do accomplish this end. I think that it is entirely appropriate for different treaties to provide different definitions for the political offense exception, just as different treaties provide for different schedules of extraditable crimes. With regard to substantive definitions it is desirable to be able to frame bilateral treaties on a flexible basis. It obviously benefits our country to have close relations with our close allies. It is misleading to refer to submitting "lesser allies" to closer scrutiny, since we have many extradition treaties with countries that cannot be called "allies" at all. I would surely hope that we would take a

Honorable John F. Kerry
November 12, 1985
Page Six

different view, again with regard to substantive requirements, concerning extradition to South Africa than we would concerning extradition to Canada.

I am less certain concerning treaty-by-treaty negotiation of procedural, rather than substantive, issues. Thus, where treaties (such as those with Mexico and Columbia) actually do provide for a different judicial role, the benefit, if there is any, is much less clear.

8. In place of the supplementary treaty now before the Senate, what would be your view of legislation incorporating a strong "wanton crimes" exception to the political crimes defense, coupled with a right of appeal to the circuit courts?

A. I strongly urge the Congress to enact legislation that defines and regularizes the application of the political offense exception. Such legislation would form a baseline that would apply to every country and every treaty. I do not see this as excluding the possibility of negotiating treaties with certain countries that apply standards higher than those of the baseline.

Honorable John F. Kerry
November 12, 1985
Page Seven

9. You have written that "the principle that a nation should not deliver a political offender to the government against which he has taken up arms is held so universally that we now commonly may speak of a right of political asylum." Do you believe that the supplementary treaty is consistent with that standard?

A. Yes.

10. You have stated that "a better resolution of the problem [of defining political offenses] is to focus upon the nature of the violent activity charged, rather than upon the fact that violence of a specified type was involved." In your view is this the approach taken in the supplementary treaty?

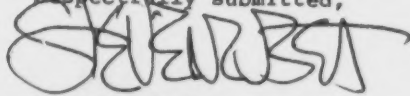
A. Yes. The quoted statement was made with regard to general legislation that would have applied to every treaty and every country. In that connection, I stated that it made more sense to look at the nature of the violent activity than at the simple fact of violence, because we maintain extradition treaties with countries such as South Africa, Poland, and Albania. Similar factors do not obtain in the case of a specific treaty with a democratic country. Moreover, the supplementary treaty does focus upon the "nature of the violent activity" in that it only applies to violent activity committed within the jurisdiction of British law.

Honorable John F. Kerry
November 12, 1985
Page Eight

11. What is your view of recent legislative efforts to deal with this problem, such as S. 1940 in the 97th Congress and H.R. 3347 in the 98th Congress?

A. I strongly support legislative overhaul of our entire extradition system. Regarding the specifics of particular proposals, please see my article on extradition reform that appears in 15 Cornell International Law Review 247 (1982). As I stated in my answer to question 8 above, legislation should be viewed as a baseline, at least regarding substantive law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'SLUBET', written over the typed name.

Steven Lubet
Professor of Law

SL:ml
Enc.

A COMPARATIVE ANALYSIS OF THE UNITED KINGDOM'S
EMERGENCY PROVISIONS ACT FOR NORTHERN IRELAND
AND PREVENTION OF TERRORISM ACT AND
MARTIAL LAW PROVISIONS IN THE PHILIPPINES,
SOUTH AFRICA, AND SOUTH KOREA

It is difficult effectively to compare the specific provisions of different legal systems since the basic structure of the systems can vary greatly. A comparison such as this cannot properly put the provisions in context. As requested, this review focuses on the actual constitutional and statutory provisions, rather than on their implementation. In the countries discussed, the law as applied may differ from the law as written. For a report on how the laws are actually applied in each country, recourse to the State Department's annual Country Reports on Human Rights Practices is recommended.

The U.K. Northern Ireland (Emergency Provisions) Act of 1978 [hereinafter "EPA"], the U.K. Prevention of Terrorism Act of 1984 [hereinafter "PTA"], and the "martial law" provisions of the Philippines, South Korea, and South Africa all have an impact in several areas. It is thus helpful to develop three broad categories of analysis for comparative purposes: (1) the origin of the provisions; (2) provisions affecting individual rights and liberties; and (3) any other, special provisions.

I. ORIGINS

The EPA consolidates earlier acts, particularly the Northern Ireland (Emergency Provisions) Act of 1973, which was in turn based on a detailed commission study of how Northern Ireland's legal procedures should be altered to deal with increased terrorist activity. The EPA applies only to Northern Ireland. In 1984 the British Parliament enacted the PTA, with provisions that apply throughout the United Kingdom, also to respond to increased terrorism. Both the EPA and the PTA provide for some form of "renewal" -- that is, the Acts will expire automatically unless periodically renewed.

Neither the Philippines nor South Korea is currently under martial law. In both countries, however, constitutional amendments enacted during periods of martial law vest in the Executive broad discretionary powers to suspend or limit individual rights under certain conditions. In South Africa, the President on July 21, 1985 issued a declaration that a state of emergency existed in certain specified areas of the country. Under the Public Safety Act of 1953, this declaration triggered certain special police powers.

II. PROVISIONS AFFECTING INDIVIDUAL RIGHTS AND LIBERTIES

A. Creation of Crimes

The EPA makes membership in certain terrorist organizations, like the Provisional IRA, a criminal offense. Soliciting support for, soliciting membership in, or carrying out an order from, one of the listed groups is also a crime. Further, the Act makes illegal the gathering or possessing of information about individual police officers, soldiers, judges, or prison employees that might be useful to terrorists planning acts of violence. Training persons in the use of firearms and explosives, dressing or behaving in public like a member of a proscribed organization, and wearing a hood in public are also crimes under the EPA.

The PTA creates crimes similar to those of the EPA: it makes membership in certain terrorist groups and withholding information that might help prevent an act of terrorism or the apprehension of a terrorist illegal.

Neither the Philippines nor Korea currently has any "martial law" crimes. Criminal offenses in those countries are specified by statute. South Africa's emergency declaration, however, did establish several new crimes. Specifically, it gave the Commissioner of the Police power to issue certain types of orders -- for example, closing of any public or private place, demarcating any area and regulating entry to and exit from it, and establishing curfews -- and made failure to comply with such orders a crime.

B. Arrest and Detention

The EPA allows police to arrest anyone "suspect[ed] of being a terrorist" and to hold that person for up to 72 hours for questioning. EPA, §11. The EPA also allows the military to arrest a person on suspicion of an offense and hold him up to four hours for questioning. EPA, §13.

Further, it is possible under the EPA for the British Secretary of State to reactivate a system of administrative detention once prevalent in Northern Ireland. See EPA, §33(3). Under this system, persons suspected of terrorist acts could be detained under an order from the Secretary of State for periods up to six months. Such detention, however, has not been used since 1975.

While the EPA is limited to Northern Ireland, the PTA gives police broader powers of arrest anywhere in the United Kingdom. They may arrest anyone reasonably suspected of the "commission, preparation or instigation of acts of terrorism" connected with Northern Ireland. PTA, §12. This can be less than reasonable suspicion that a particular crime has been

committed, the normal standard for arrest in the United Kingdom. Under the PTA arrest power, persons can be detained for questioning for up to 48 hours, and, at the discretion of the Secretary of State, for up to five additional days.

Under Philippine law, warrants based on probable cause are required for arrests except: (1) when the person to be arrested has committed, is actually committing, or is about to commit an offense in the presence of the arresting officer; (2) when an offense has been committed and the arresting officer has reasonable grounds to believe that the person to be arrested has committed that offense; and (3) when the person to be arrested has escaped from a penal institution. The 1983 "Preventive Detention Action," a presidential decree, also authorizes arrest by presidential order without a court warrant and detention without bail until the President authorizes release. Each case must be reviewed annually.

South Korean law permits arrest without a warrant in three circumstances: (1) when there are sufficient grounds to suspect the commission of an offense punishable by death or imprisonment for more than three years; (2) when there are reasonable grounds to believe that the suspect will destroy evidence or may escape; and (3) when there is great urgency and a warrant cannot be obtained before the arrest. If a suspect is arrested without a warrant, a warrant must be obtained within 72 hours or the suspect must be released. Under "social protection" and "social stability" laws, an individual deemed "socially dangerous" is subject to preventive detention for a fixed term, which a judicial review panel may extend for up to 10 years.

South Africa's state of emergency allows the military or police "without warrant of arrest, [to] arrest or cause to be arrested any person whose detention is, in the opinion of [the arresting official], necessary for the maintenance of public order or the safety of the public" The authorities may also "under a written order signed by any member of the [military or police], detain, or cause to be detained, any person in custody in a prison."

C. Search and Seizure

The EPA grants police and the army broad powers to conduct searches. They have complete power to enter "any premises or other place other than a dwelling-house" to search for munitions or radio transmitters. EPA, §15. To search a dwelling for munitions and transmitters, the authorities must have a suspicion that such articles are present, as well as the authorization of a high level official -- an officer of the army or a police official of the rank of chief inspector or above. EPA, §15. More generally, Constables are given the power to search, for the purpose of arresting a person, any

place that they "suspect" that person may be. EPA, §13(2). Finally, authorities may enter and search any place to ascertain whether someone is "believed to be unlawfully detained in such circumstances that his life is in danger," EPA, §17(1), and may enter any place when necessary "for the preservation of the peace or the maintenance of order." EPA, §19.

The PTA provides only limited search powers. The Secretary of State may authorize officials to search ships and aircraft in connection with examining persons entering or leaving Great Britain or Northern Ireland to determine whether they have been involved in the commission, preparation, or instigation of an act of terrorism. PTA, §13(2)(b).

The Philippine Constitution requires that no search be "unreasonable" and that the requisite search warrant issue only upon probable cause. Under a 1983 presidential decree, however, the President himself may authorize a search without a warrant in subversion cases. Similarly, a warrant based on "reasonable belief" is required for searches in South Korea, unless it is not possible to obtain a warrant due to urgency at the crime scene, in which case a warrant must be obtained thereafter without delay.

Under the provisions of the South African state of emergency, the military or police "may at any time search or cause to be searched any person, premises or place, or any vehicle, vessel, aircraft or receptacle." Authorities may seize any article that is intended to be used in the commission of any offense or that provides evidence of the commission of an offense. Moreover, authorities are authorized to enter and search any place, vehicle, vessel, or aircraft if they have reason to suspect that any person who may be arrested pursuant to the state of emergency declaration is there.

D. Freedoms of Speech and Assembly

As mentioned above, the EPA makes membership in certain organizations a crime. In addition to this restriction, the EPA limits freedom of speech in that it prohibits the solicitation of support for, or membership in, the proscribed organizations. The Act gives any army officer, or police officer (not below the rank of chief inspector) the power to disperse certain assemblies. If the official determines that "any assembly of three or more persons -- (a) may lead to a breach of the peace or public disorder; or (b) may make undue demands on the police . . . he . . . may order the persons constituting the assembly to disperse forthwith." EPA, §24.

Other than its prohibition of certain terrorist organizations, the PTA does not treat matters relating to speech or assembly.

The Philippine Constitution guarantees both freedom of speech and the right of peaceful assembly. The State Department's Country Reports on Human Rights Practices for 1984 indicates that currently there is a large degree of freedom for criticism of, and opposition to, the government.

South Korea's Constitution also guarantees speech and press freedoms. Korean law, however, prohibits assemblies "likely to undermine public order or cause social unrest," and requires that demonstrations of all types be reported in advance to the police, who have the power to enter areas and buildings to break up illegal demonstrations.

The emergency provisions in South Africa provide that whenever any officer in the South African military or police "is of the opinion that the presence or conduct of any person or persons . . . endangers or may endanger the safety of the public or the maintenance of public order" he shall order such persons to "desist from such conduct." The regulations add that "force will be used if the order is not obeyed forthwith." The regulations also limit official information about persons detained pursuant to the state of emergency.

E. Right to Counsel

Both the EPA and PTA leave in place the right to counsel that normally exists under the U.K.'s law. Similarly, right to counsel is guaranteed by the Constitutions in both the Philippines and South Korea. The South African state of emergency provisions permit a detainee to be visited by counsel, but only after police permission is granted; only one such visit is permitted. With respect to hearings regarding violations of prison regulations, however, the emergency provisions do not permit the presence of the detainee's counsel without police consent.

F. Jury Trial

The EPA eliminates jury trials for certain specified terrorist offenses. Instead, these crimes are tried in so-called Diplock Courts. [For a more detailed analysis of Diplock Courts, see the response to Senator Dodd's first question.] The PTA does not affect the right to trial by jury in the United Kingdom.

The legal systems in the Philippines, South Korea, and South Africa do not utilize jury trials.

G. Bail

To insulate lower level judicial officials -- magistrates, justices of the peace -- from terrorist threats, the EPA gives the power to grant bail in the case of a terrorist offense to a High Court Judge (or the trial judge when the trial is adjourned). The Act places on the accused the burden of demonstrating that he has met the requirements for being granted bail. The EPA requires that bail be granted only when the court is satisfied that the applicant: "(a) will comply with the conditions on which he is admitted to bail; and (b) will not interfere with any other witness; and (c) will not commit any offence while he is on bail." EPA, §2(2).

The PTA does not deal with bail, and neither do the South African emergency provisions. Both the Philippine and South Korean systems permit bail in certain circumstances. In the Philippines, the Constitution gives "[a]ll persons, except those charged with capital offenses when evidence of guilt is strong" the right to reasonable bail. Under a 1983 presidential decree, however, the right to bail may be suspended in individual cases of "subversion." Such cases must be reviewed annually. Under South Korean law, bail will be granted unless: (1) the accused is charged with an offense punishable with death or more than ten years imprisonment; (2) there are reasonable grounds to suspect that he will destroy evidence or escape; or (3) his dwelling is not known.

III. SPECIAL PROVISIONS

The EPA, PTA, and the state of emergency regulations of South Africa all have certain provisions that are unique. Each of the following provisions has no real counterpart in the law of the other relevant countries.

A. Special Criminal Courts

The EPA established special criminal courts, the Diplock Courts. For a detailed analysis of the Diplock Courts, see the response to Senator Dodd's first question.

B. Young Persons

The EPA adopted several provisions relating to the problem of youths attacking soldiers or committing other terrorist crimes in Northern Ireland. The Secretary of State is authorized by the Act to direct that any "young person" -- age 14 through 16 -- being held without bail be held in a prison instead of a juvenile home, "in order to prevent his escape or to ensure his safety or the safety of others . . ." EPA, §4(2). Such a direction must be renewed every two months.

EPA, \$5. In addition, a court may sentence to imprisonment any young person convicted of any offense that is punishable in the case of an adult for five years or more, EPA, \$10; for those crimes requiring remand to a juvenile home, the maximum term is six months.

C. Exclusion

The PTA has adopted special provisions to deal with the problem of importation of terrorism. Under the Act, the Secretary of State is granted power to issue exclusion orders. Such orders may be revoked by subsequent order of the Secretary, or in any event expire after three years. The Secretary may exclude any person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" that are "designed to influence public opinion or Government policy with respect to affairs in Northern Ireland," or who "is attempting or may attempt to enter . . . with a view to being concerned in the commission, preparation or instigation of such acts of terrorism. . . ." PTA, §§ 3(6), 4(1). Exclusion orders can exclude an individual from Northern Ireland, Great Britain, or the United Kingdom. British citizens "ordinarily resident" in the area from which exclusion is sought are not subject to an exclusion order.

D. Access to Detainees

The South African emergency provisions state that:

- "[n]o person, other than . . . a person acting by virtue of his office in the service of the state --
- (a) shall have access to any person detained [under the emergency provisions] . . . except with the consent of and subject to such conditions as may be determined by . . . the Commissioner of the South African Police; or
 - (b) shall be entitled to any official information relating to such person"

Responses from State to questions from Senator Trible

Senator Trible

Q-1. What countries other than the United Kingdom have recognized the kind of regime, like that contained in the European Convention on the Suppression of Terrorism, in which there is a limitation of the political offense exception?

A. The limitations on the political offense exception to extradition contained in the European Convention on the Suppression of Terrorism have been accepted without reservation by the following 8 States: Austria, the Federal Republic of Germany, Lichtenstein, Luxembourg, Portugal, Spain, Turkey, and the United Kingdom.

Similarly, the United States and many other States have included in their bilateral extradition treaties provisions specifying that the political offense exception to extradition shall not be available in cases involving the murder of the Head of State or members of his family, nor in cases involving crimes for which the parties have an obligation pursuant to a multilateral agreement either to extradite a suspected offender or to submit his case for prosecution. The latter involves offenses like aircraft hijacking or sabotage, taking hostages and crimes against internationally protected persons, including diplomats.

Responses from State to questions from Senator Biden

Q-2. Please provide for the record an analysis of a comparison of the Emergency Provisions Act of Northern Ireland, the Terrorism Act of the U.K. and the state of emergency martial law that has been adopted in South Africa, and the martial law provisions that are in operation in the Philippines and in South Korea now.

A. An analysis of those laws is attached.

Q-3. Please submit for the record the number of times in the last 20 years that the State Department has, in fact, recommended asylum for anyone from the British Isles and the number of times it has been granted.

A. Neither the Department of State nor the Immigration and Naturalization Service (INS) has maintained statistics that would identify, for the 20 year period of interest, the number of persons from the British Isles who have requested asylum in the United States, what recommendations the Department may have made in such cases, or the disposition of such cases.

However, based upon incomplete statistics and other information available to it, the Administration believes that only a small number of applications for asylum have been filed by individuals from the British Isles. We have been able to find no record of a favorable State Department recommendation in such cases, although it should be noted that the Department had no formal role in the asylum process before 1972.

Responses from State to questions from Senator Kerry

Q-1. Is it true that the treaty would require inquiry into the intent of persons sought for extradition for crimes involving possession with criminal intent? If so, isn't that a problem?

A. Such an inquiry into intent is not problematical. Inquiries into the intent of persons sought for extradition commonly occur in extradition proceedings. Indeed, the current US-UK extradition treaty specifies a variety of extraditable offenses that require inquiry into intent (e.g., assault with intent to murder; "[a]ny malicious act done with intent to endanger the safety of persons travelling or being upon a railway"). Moreover, US courts routinely adjudicate defendants' intent in criminal matters. Thus, these provisions in the Supplementary Treaty do not create any new or unfamiliar role for the courts.

Responses from State to questions from Senator Pell

Q-1. If the Supplementary Treaty were ratified, what effect would it have on the current practices and methods of deciding asylum cases?

A. The adjudication of asylum claims in the United States is governed by sections 101(a)(42) and 208 of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42), 1158, and by the regulations of the Immigration and Naturalization Service, 8 C.F.R. Part 208. The Supplementary Treaty would not revise those provisions of law, nor affect their application in practice. The Supplementary Treaty relates solely to the extradition process, not to the application of our immigration laws.

Q-2. Does the Administration consider all the offenses listed in the proposed treaty to be serious "non-political crimes" under the Immigration and Nationality Act?

A. Yes.

Responses from State to questions from Committee Staff

Q-1. What U.S. foreign policy interests are served by this treaty?

A. The United States is a leading actor in the international struggle against terrorism. But no matter how determined we are, we cannot fight this battle alone. We must have the cooperation of our allies.

To obtain that cooperation, we must be able to demonstrate our seriousness of purpose in concrete terms. Recent actions have shown proof of our determination: e.g., enactment last year of implementing legislation for our obligations under the Montreal Anti-Hijacking Convention and the Hostages Convention; and enactment of legislation authorizing the offering of rewards for information leading to the arrest and conviction of persons who have engaged in acts of terrorism against the United States and its citizens abroad. In addition, the Congress now has before it a proposal to make acts of terrorism abroad against US citizens federal offenses triable in U.S. courts, which the Administration supports.

It is necessary that we take such steps so that we can match our rhetoric with deeds. We cannot credibly ask - indeed insist - that our allies act firmly against terrorism if we are not prepared to do so ourselves.

The present Supplementary Treaty represents a further step in that direction, consistent with the rule of law. It reflects the commitment of the United States not to afford refuge to terrorist criminals from an open society like the United Kingdom, which allows full and free expression of opinions. It is a step that we plan to take with other open societies.

The failure of the United States to ratify this treaty would be viewed by our allies as a failure on our part to do as we say. It will make it all the more difficult for us to persuade our allies to work in concert with us to deal effectively with international terrorism.

Beyond this overriding issue of principle, we also face the risk that this country may become a haven for terrorists. Any trend in that direction would greatly harm our foreign relations, in addition to creating serious threats to our own security.

Q-2. What is the reason for the change in the statute of limitations provision? For what crimes covered by this treaty is the statute of limitations longer in the United Kingdom than in the United States?

A. Article 2 of the Supplementary Treaty, relating to the statute of limitations, is essentially a technical change made at the request of the United States. The rationale for this change is explained in detail in response to Senator Dodd's third question above.

The United Kingdom generally has no statute of limitations for criminal offenses. Under US law, the statute of limitations is generally five years for non-capital offenses, and there is generally no statute of limitations for capital offenses. In addition, under US law, 18 U.S.C. 3290, the statute of limitations is tolled if a person becomes a fugitive from justice. Each of the 50 States has statutes of limitation for varying crimes, and some of the States have tolling provisions similar to 18 U.S.C. 3290.

Q-3. Some people have asserted that this treaty is anti-Irish. What is your response?

A. The purpose of this treaty is to enhance the ability of the United States and the United Kingdom to take effective law enforcement action against those who place themselves above the law, and victimize our respective societies through violence and terror.

It is not directed at the Irish, whether Republican or Loyalist, nor at the English, Scottish or Welsh, or at Americans. It is directed at all criminals of any nationality in the United Kingdom and the United States who would use violence as a means of expressing their views.

Regrettably, recent events illustrate not only that terrorists cross international borders to reach their victims, but that terrorist groups of different nationalities have increased their cooperation with each other.

This treaty is directed at each and every one of those persons who would seek to work their will through violence in the United States or the United Kingdom. It is not directed at the Irish.

Q-4. Is the Administration considering negotiating similar treaties with other nations? If yes, are there any criteria you are using in deciding which countries to negotiate such changes with?

A. The United Kingdom is not the only country with which we have raised this proposal. We have also discussed it with other countries, which, like the United Kingdom, are democracies which allow the free expression of views, and in which resort to violence cannot be accepted as a legitimate form of political expression.

As our negotiations are not yet completed in those cases, it would not be appropriate to identify those other countries at this time. Their names and any changes that we do conclude will, of course, be notified to the Senate when we seek Senate approval, i.e., its advice and consent to ratification, of those changes.

We cannot specify all the criteria that we will apply in selecting those countries with which we will negotiate similar provisions, since each country presents some factor or circumstance that is unique to it. However, a threshold issue will be - and has been in our negotiations to date - whether the country allows free expression of views, including unpopular or dissenting views. It is incompatible with a sense of justice to sanction the use of violence as a means of expression in such an open society. The political offense exception as it is now interpreted and applied by US courts serves to excuse such conduct. We will seek to correct that situation. In addition, it will be important that the nation in question maintains a fundamentally fair judicial system.

Q-5. Some suggest a distinction should be made between situations like that in the Doherty case where the acts were committed against one soldier by another and those in Quinn where the violence was directed against civilians. Do you believe this is a valid distinction?

A. Since the Quinn and Doherty cases are still in litigation, this answer will not address either case directly, nor the characterization of the facts in those cases reflected in the question.

There is no doubt, however, that it is the view of the Administration that no valid distinction can be made between a terrorist assault on a victim who happens to be in military or police service and such an assault on one who is not. The recent, brutal murder of Robert Stethem provides a perfect and tragic example why such distinctions are false and dangerous. The fundamental unacceptability of this distinction is also apparent when one considers how readily it could be made by other nations in granting refuge to extremists who are members of organized groups, like the FALN or the Weathermen, and who kill American military or police personnel.

It must also be recalled that this Supplementary Treaty would apply between two countries, the United States and the United Kingdom, that allow - indeed, protect - the free expression of opinion and participation in government. No one should be allowed in either of those societies to kill, maim or assault as a means of expressing his political opinion.

Q-6. In 1982 and again in 1983 the Foreign Relations Committee reported legislation similar to this treaty. A principal difference was that the Committee bill permitted an accused to assert the political offense exception in "extraordinary circumstances." Would you favor inclusion of such a provision in this treaty?

A. The Administration strongly opposes such a provision for several reasons, and believes that the rationale for the proposal stated by the Committee in connection with the general legislative effort several years ago counsels against its inclusion in the Supplementary Treaty.

In supporting that proposal in 1982, the Committee said:

It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an ostensible political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate civil or political rights in a non-violent manner, is placed in such a position that he has no reasonable choice except to commit an otherwise criminal act.

Senate Report 97-475.

In 1982 and 1983, the Committee was considering legislation of general application. This Supplementary Treaty is with a specific country -- a country which guarantees the legitimate exercise of civil and political rights, and which affords a fundamentally fair judicial system. The caution which the "extraordinary circumstances" provision embodies is not applicable to the United Kingdom.

Finally, it should be noted that under the Committee's approach in 1982, a political offense would never include -

an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

The Administration thoroughly supports that approach, and it is in fact reflected in Article 1 of the Supplementary Treaty.

But the Committee also proposed that certain serious common crimes, like murder, could be political offenses in extraordinary circumstances.

Consequently, the approach would allow no political offense exception for those offenses as to which the United States would have the jurisdiction to prosecute were it to deny extradition. In contrast, the 1982 approach would allow the political offense exception, in extraordinary circumstances, with respect to those offenses, like murder committed abroad, for which the United States could in most cases not prosecute. In such cases, should the extradition request be defeated, our only recourse would be to our immigration laws and its cumbersome process for deportation. The accused would have eluded the need to face the charges against him at trial.

The Administration believes that these are persuasive arguments why it would be woefully inappropriate to include such a provision in this treaty.

Q-7. Please describe the negotiating history of this supplementary extradition treaty with the United Kingdom. Specifically, did the United States or the United Kingdom initially request negotiations for this treaty and when did negotiations begin?

A. Negotiations on this treaty were begun last year at the initiation of the United States. The general approach of the treaty was proposed by the United States delegation, although the final version reflects, of course, changes agreed to in the negotiations.

Q-8. Please describe the judicial standard or criteria used by U.S. courts in applying the political offense exception.

A. The prevailing standard used in recent extradition decisions imposes a two-part requirement on an individual seeking to benefit from the political offense exception to extradition:

The first requirement is that there be, at the time of the charged offense for which extradition is sought, an uprising or other violent political disturbance, such as war, revolution or rebellion.... The second requirement is that the charged offense be incidental to and in the course of the political uprising.

Quinn v. Robinson, No. C-82-6688 (N.D.Cal. Oct. 3, 1983); accord, In Re Mackin, No. 80 Cr. Misc. 1, p. 54 (S.D.N.Y. Aug. 13, 1981); In Re McMullen, Mag. No. 3-78-1099 MG (N.D.Cal. May 11, 1979). This requirement is derived from the English decision in In Re Castioni, [1891] 1 Q.B. 449.

This standard has not been followed uniformly in all cases.

One decision has limited this standard. In Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981), the court agreed with the general proposition that the political offense exception is limited to "acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion." 641 F.2d at 518. But the court

went on to hold:

The definition of "political disturbance," with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the government.

Id. at 520-21.

The Eain decision has led some to assert that the United States does not extend the political offense doctrine to fugitives who commit "wanton crimes." Such assertions are exaggerated and misleading. The Eain decision did not hold that attacks on civilians could never fall within the scope of the political offense exception; nor did it rule on whether attacks on individual military or other government personnel, like policemen, were acts that "disrupt[ed] the political structure of a State [or disrupted its] social structure...." Rather the court held that, under the facts of that case, there was no direct link between the perpetrator, a political organization's political goals, and the specific act.

A recent decision relating to the political offense doctrine, In Re Doherty, 83 Cr. Misc. 1, page 26 (JES) (Dec. 12, 1984), declined to apply the prevailing two-part standard, ruling that it was both too broad and too narrow. On one hand, the court found that "[n]ot every act committed for a political

purpose or during a political disturbance may or should properly be regarded as a political offense...." On the other hand, "[t]he Court reject[ed] the notion that the political offense exception is limited to actual armed insurrections or more traditional and overt military hostilities...."

The court identified the relevant considerations as follows:

[T]he Court must assess the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place.... Therefore it is proper for the Court to consider the nature of an organization, its structure, and its mode of internal discipline, in deciding whether the act of its members can constitute political conduct under an appropriate interpretation of the Treaty.

Q-9. How many instances have there been over the past 20 years where US courts have relied upon the political offense exception as the basis for denying extradition?

A. According to our research of United States case law, there have been four instances during the past 20 years in which United States courts have relied upon the political offense exception as the basis for denying an extradition.

Q-10. In regard to the United Kingdom, how many instances are there where the UK has sought extradition of one of its nationals and US courts have denied the extradition request on the basis of the political offense exception?

A. There have been four such cases in the last five years. Two of those cases are still before the courts.

Q-11. How many instances have there been over the past 20 years in U.S. courts where the political offense exception has been raised and extradition has nevertheless been granted?

A. According to our records, there have been 8 instances during the past 20 years in which the political offense exception has been raised and US courts have ruled in favor of extradition. It should be recalled, however, that many magistrate's decisions in extradition cases are not reported, and, thus, the actual figure may be larger.

Q-12. Are there any instances involving the UK or any other country where an extradition request from the United States has been denied on the basis of the political offense exception?

A. Yes.

In his testimony before the Committee on August 1, the Legal Adviser of the Department of State referred to two particularly egregious denials. Other extradition requests of the United States have been denied on political offense grounds, although we have not had that experience with the United Kingdom.

Q-13. Is there any precedent for limiting the political offense exception in the manner proposed in the supplementary treaty?

A. Yes.

Efforts to limit the scope of the political offense exception to extradition date back to the Belgian "attentat" clause of 1856, which specified that attempts on the life of a foreign Head of State or government, or members of his family, would not be considered political crimes. This limitation was first included in a U.S. treaty in 1852 with Belgium, and, subsequently, has been incorporated into many extradition treaties internationally.

In addition, modern extradition treaties, for example US-Canada (1971) and US-FRG (1976), place a further limit on the scope of the political offense exception by providing that certain offenses which are the subject of multilateral international agreements, e.g., aircraft hijacking, shall not be considered political offenses.

In 1977, member States of the Council of Europe adopted the European Convention on the Suppression of Terrorism. That Convention limits the scope of the political offense exception

by specifying that certain crimes, e.g., aircraft hijacking or sabotage, attempts against diplomats and other internationally protected persons, hostage taking or kidnapping, the use of explosives and automatic firearms, would not be regarded as political offenses for the purpose of extradition. The Convention also lists certain other crimes, e.g., acts of violence against the life, physical integrity or liberty of persons, which the parties "may decide not to regard as a political offense." Eight States have become parties to that Convention without reservation with respect to these limits on the political offense exception .

Accordingly, there are ample precedents in international law and practice for the approach to limiting the political offense exception contained in the Supplementary Treaty.

Q-14. Under the proposed treaty what acts could still be considered by U.S. courts as political crimes?

A. All pure political offenses, e.g., treason, espionage and sedition, would remain protected by the political offense doctrine. However, under the Supplementary Treaty, the political offense exception to extradition would not be available in almost all cases involving violent crimes against persons. By its terms, there are clearly some kinds of less serious violent crime against persons, such as simple assault, that would not be affected by the Supplementary Treaty.

Similarly, by its terms, the Supplementary Treaty would apply in cases involving explosives offenses only where there was a likelihood of danger to life or serious damage to property or an intent to accomplish either. In cases involving explosives offenses in which the government failed to persuade the court that either element was present, the person sought in extradition could seek to avail himself of the political offense exception.

In the same vein, the Supplementary Treaty limits its application to offenses involving firearms or ammunition only in those cases where there is a specific intent linked to use or possession. In cases in which that intent is not established, the political offense exception would remain available.

Q-15. Under the supplementary treaty, would the courts be able to consider in any manner the nature of the judicial system that will try the person whose extradition is being sought? For instance, many offenders in Northern Ireland are tried in the so-called "Diplock Courts" in which there are no jury trials and as many as 30 or 40 defendants are frequently tried together for widely varying offenses. Could these factors be considered by U.S. courts under the proposed treaty?

A. No.

The Supplementary Treaty in no way alters the status quo in this area. Established case law clearly provides that inquiry in such matters as the judicial process that a person extradited would face is clearly within the exclusive jurisdiction of the Department of State. Sindona v. Grant, 619 F.2d 167, 176 (2d Cir. 1980); In Re Mackin, No. 80 Cr. Misc. 1, p. 68 (S.D.N.Y. Aug. 13, 1981).

Notwithstanding this rule, a US court recently reviewed the judicial process of Northern Ireland and rendered this judgment:

The Court ... specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. ... The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to discharge their responsibilities in that regard.

In Re Doherty, 83 Cr. Misc. 1, pp. 11-12 (JES) (Dec. 12, 1984).

Q-16. Under the supplementary treaty, could U.S. courts consider the political beliefs, motives or associations of a person whose extradition was sought by the United Kingdom?

A. To the extent that a US court judges any of these factors to be relevant to a determination of whether there is probable cause to believe that the person sought in extradition committed the crime with which he is charged, the court will consider them. The Supplementary Treaty does not alter that situation.

Q-17. Under the supplementary treaty, could the person whose extradition was sought ever present "extraordinary circumstances" as a justification for his acts?

A. A person sought in extradition for an offense covered by Article 1 of the Supplementary Treaty could not avail himself of the political offense exception to extradition, whether or not he argued that "extraordinary circumstances" justified his criminal conduct.

To the extent that "extraordinary circumstances" may be relevant to the question of probable cause, however, they could be presented.

Q-18. By revising the political offense exception on an ad hoc basis with the United Kingdom, could we be perceived as taking sides with respect to domestic political unrest within the United Kingdom?

A. The US-UK Supplementary Treaty does not represent "taking sides" in domestic British politics. It does take sides against violence. In so doing, it advances important US domestic and foreign policy interests.

The United States cannot allow itself to become a haven for those who use terror and violence to express their political views in or about societies abroad that allow full freedom of expression. Also, in order to encourage our allies to take effective steps against terrorism, the United States must be able to demonstrate affirmatively that the United States, itself, is prepared to pursue meaningful measures, consistent with international law, to combat the scourge of terrorism.

The US-UK Supplementary Treaty is such a meaningful measure.

In addition, it is misleading to describe the Supplementary Treaty as an "ad hoc [arrangement] with the United Kingdom." This implies falsely that the Administration is seeking to limit the scope of the political offense exception only with respect to our extradition relations with the United Kingdom. Furthermore, a state-by-state standard is inherent in

implementing this policy through treaties, rather than by legislation. The use of treaties is necessary here because it is preferable that the political offense exception be revised only with nations that have open political systems and fundamentally fair judicial processes. The approach that is being followed by the Administration in the Supplementary Treaty, and similar ones now under negotiation with other democracies, enables our government to evaluate, on a nation by nation basis, whether a limitation on the political offense exception is appropriate.

Q-19. Within the past five years the Senate has twice considered revisions to the political offense exception. This Committee has previously reported legislation containing a standard for the political offense exception that is broader than the standard embodied in the supplementary treaty. Please describe the differences between the standard in this treaty and the standard contained in legislation twice reported by this Committee.

A. Legislation reported by the Committee on June 17, 1982, Senate Report No. 97-475, limited the applicability of the political offense exception in two respects. For one category of offenses, the political offense exception would never be available; for the other it could be available in extraordinary circumstances. In contrast, the Supplementary Treaty provides that the political offense exception is always unavailable with respect to all crimes involving the offenses listed in Article 1 of the treaty.

In the category of those offenses for which the political offense exception would never be available, the Committee included offenses that are the subject of multilateral international agreements containing an obligation to extradite offenders or submit their cases for prosecution. Article 1(A) through (D) of the Supplementary Treaty treats substantially the same offenses in the same manner as the Committee's proposal. In this category, the Committee's proposal is broader than the Supplementary Treaty, however, in that

the Committee also proposed that the political offense exception would not be available for offenses relating to narcotics trafficking.

In the category of offenses for which the political offense exception could be available in extraordinary circumstances, the Committee included common law offenses involving violence or the threat of violence, such as homicide, assault, kidnapping, firearms, and (by reference to 18 U.S.C. 921) explosives offenses. These correspond substantially to the remainder of the offenses contained in Article 1 of the Supplementary Treaty. The principal difference in approach is that, under the Supplementary Treaty, the political offense exception would not be available to a person charged with a crime involving an offense in this category, even if he were to establish that extraordinary circumstances for his criminal conduct existed.

Q-20. Does the Administration intend to continue to press for legislation, such as that introduced in the 97th Congress, to revise the political offense exception?

A. The Administration has no present intention to press for such legislation.

Q-21. Is the supplementary treaty viewed as a new standard for the political offense exception in U.S. extradition practice?

A. No.

As the Administration has already indicated, it is now negotiating similar limitations on the political offense exception with other stable democracies. It does not plan, however, that this approach will be a standard clause in all of our future extradition treaties.

Q-22. With what countries is the U.S. currently engaged in negotiations for new or amended extradition treaties? Is the Administration contemplating applying this standard for the political offense exception to extradition treaties currently under negotiation?

A. As the Legal Adviser of the Department of State explained at the August 1 hearing on the Supplementary Treaty, the Department of State believes that it should refrain from publicly identifying those States with which we are currently negotiating.

Q-23. Will not the separate treatment of the political offense exception for one country lead to a proliferation of diverse standards to be applied by the courts? Is the development of "double standards" in this area of the law wise from the standpoint of a judicial policy?

A. The United States may extradite fugitives to foreign jurisdictions only pursuant to a treaty. 18 U.S.C. 3181 et seq. Thus, each extradition request from a foreign country is examined by a US court in light of the specific terms of the applicable treaty. The texts of comparable provisions in US extradition treaties may vary significantly, reflecting the differing needs - because of varying laws or practices - in the different extradition relationships. This can also be said of the provisions in US treaties dealing with the political offense exception. The Supplementary Treaty will not alter this established situation. Some treaties have an unqualified exception; some qualify the exception in one respect or another. In short, several different standards already exist in connection with the exception, and each extradition request will continue to be adjudicated in the specific context of the relevant treaty.

Q-24. What is the impact of the standard for the political offense exception contained in the supplementary treaty on the law of political asylum? Is it possible, under the narrowed definition of the political offense exception contained in this treaty, that a person could be granted asylum under immigration law (because the offense is considered "political" for asylum purposes) but could nevertheless be extradited under the supplementary treaty?

A. The adjudication of asylum claims in the United States is governed by sections 101(a)(42) and 208 of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42), 1158, and by the regulations of the Immigration and Naturalization Service, 8 C.F.R. Part 208. The Supplementary Treaty would not revise those provisions of law, nor affect their application in practice. The Supplementary Treaty relates solely to the extradition process, not to the application of our immigration laws.

However, it should be noted that our immigration laws now provide that an alien is ineligible for asylum if there are serious reasons for considering that he has committed a "serious non-political crime." 8 C.F.R. 208.8(f)(1)(v). The limitations in the Supplementary Treaty on the applicability of the political offense exception to extradition are analogous to these restrictions on the availability of asylum under our immigration laws.

Since asylum applications and extradition requests are adjudicated in different processes, it is possible that conflicting conclusions could be reached in the respective proceedings on the same facts. The few rulings of the Board of Immigration Appeals on the doctrine of "serious non-political crime" indicate, however, that the offenses contained in Article 1 of the Supplementary Treaty would be considered to be serious non-political crimes for the purpose of asylum adjudications. This would mean that those crimes deemed "political" in the asylum process would generally be crimes to which the political offense exception would (and should) apply. Little if any inconsistency would result.

Q-25. Under the supplementary treaty with the U.K., would the Executive Branch retain the authority to withhold extradition if the State Department believed the request was primarily politically motivated?

A. Yes.

Q-26. If this treaty is adopted do you foresee increased political pressure on the State Department to extradite in cases involving other countries?

A. No.

Q-27. What are the reasons for making the supplementary treaty retroactive as well as prospective?

A. This is standard practice in US extradition treaties.

As explained in response to another question, no unfairness is caused by this provision, since the acts for which extradition would be granted must have been criminal at the time they occurred.

Q-28. Could you briefly summarize the historical origins of the political offense exception?

A. A summary of the origin and evolution of the political offense exception to extradition is contained in the written statement submitted to the Committee on August 1, 1985 by Abraham D. Sofaer, Legal Adviser of the Department of State.



I.D.F. Spokesman

June 1982

SUMMARY OF OVERSEAS TERRORIST ACTIVITY

The following pages contain a listing of all terrorist attacks perpetrated overseas from 1968 to the present.

N.B.: All dates are written with the day first, the month second and the year last.

Date	Place	Description	Organization	Perpetrator's Fate
23.7.68	Algeria	Three terrorists took over an El Al plane en route from Rome to Lod and forced it to land in Algeria.	Habash "Front"	Kidnappers imprisoned by the Algerian gov't. until released as part of an exchange.
26.12.68	Athens	Two terrorists attacked an El Al plane with small arms and hand grenades. One Israeli passenger was killed and two stewardesses injured.	Habash "Front"	Terrorists detained by Athens police until freed in the wake of the hijacking of an Olympic plane (on 22.7.70).
18.2.69	Zurich	A squad of four terrorists attacked an El Al plane with small arms and hand grenades. The co-pilot (an Israeli citizen) was killed and five passengers injured.	Habash "Front"	One of the terrorists was killed. Three others were arrested by Swiss authorities and released in Sept. 1970 in the wake of the hijacking of a Swissair plane to Jordan.
22.5.69	Copenhagen	Three terrorists accused of plotting to assassinate David Ben Gurion were arrested.	Habash "Front"	The three were released after their guilt was not proven.
18.8.69	London	Explosions in the "Marks and Spencer" commercial establishment.	Habash "Front"	
18.8.69	Copenhagen	An explosive charge placed in the Israel tourist office was dismantled.	Habash "Front"	
23.8.69	Izmir (Turkey)	An explosive charge went off in the hands of a terrorist who intended to sabotage the Israel commercial pavilion.	Hawatmah "Front"	One terrorist was killed, the second wounded and arrested.
23.8.69	Tehran London	Explosion in a Jewish school causing light damage. A hand grenade was thrown into the "Zim" office, wounding a female employee and damaging property.	Habash "Front"	
29.8.69	Rome	TWA plane en route from Rome to Lod was hijacked by two terrorists and forced to land in Damascus. Two Israeli passengers freed in return for the release of two Syrian pilots held in Israel.		
8.9.69	Brussels	Three terrorists threw a hand grenade into an El Al office. Two civilians were wounded and damage resulted to property.	Habash "Front"	Two terrorists succeeded in escaping. A third was arrested and after interrogation was expatriated to Libya.

Date	Place	Description	Organization	Perpetrator's Fate
8.9.69	The Hague	A terrorist threw a handgrenade at the Israeli Embassy.	Habash "Front"	The terrorist was arrested and after his investigation was handed over to Libya. The two terrorists succeeded in escaping.
8.9.69	Bonn	Two terrorists threw a hand grenade into the Israeli Embassy.	Habash "Front"	
9.11.69	West Berlin	Time-Bomb discovered in a Jewish Community Center.	Habash "Front"	
27. 11.69	Athens	Two terrorists threw a hand grenade into the El Al office, wounding 14 people--among them ten local citizens and four Israelis. One boy was killed by the blast.	'Popular Struggle Front'	The two terrorists were arrested by Athens police, but were released as a consequence of the hijacking of an Olympic Airways plane to Jordan, 22 July, 70.
12.12.69	West Berlin	An explosive charge was discovered near the El Al office. It was dismantled. Near "America House" a second charge was neutralized. A third charge exploded in an American Officer's club. Three terrorists who planned to hijack a TWA plane (arriving from Tel Aviv) were arrested by the local police.	Baader-Meinhof Group (Associated with the Habash "Front").	
21.12.69	Athens	Three terrorists shot and threw grenades at the passengers of an El Al plane. One Israeli passenger killed and eight others (five Israelis, three British) injured.	Habash "Front"	Terrorists released following hijacking of Olympic Airways plane on 22.7.70. One terrorist was injured. All three were arrested but released following the hijacking of a plane to Jordan in Sept. 1970.
10.2.70	Munich	Three terrorists shot and threw grenades at the passengers of an El Al plane. One Israeli passenger killed and eight others (five Israelis, three British) injured.	Executive Committee for the Liberation of Palestine.	
13.2.70	West-Germany	Arson in an old age home. Seven senior citizens died and others sustained injuries.	Jibril "Front"	Terrorists escaped to the Middle East.
21.2.70	Zurich	Swissair plane enroute from Zurich to Lod exploded in mid-air killing all 38 passengers and 9 crewmembers. (From Israel 13, M. Germany 10, U.S. 5, Switzerland 2, Mexico 2, Kenya 2, Thailand 1, Britain 1, Belgium 1, Senegal 1. All 9 crewmembers were Swiss.)	Jibril "Front"	Terrorists escaped to the Middle East.
21.2.70	Frankfurt	Explosion in cargo hold of Austrian Airlines plane. Plane damaged but landed safely.	Jibril "Front"	
24.2.70	Frankfurt	Two rigged parcels sent from Frankfurt to addresses in Israel were neutralized.	An unidentified Guatemalan organization supporting the Arabs.	
7.3.70	Guatemala	Hand grenade tossed into the courtyard of Israel's honorary consul.		

Date	Place	Description	Organization	Perpetrator's Fate
24.4.70	Istanbul and Izmir	Explosion in the EI Al office in Istanbul and Pan-American offices in Izmir.	Popular Struggle Front	
4.5.70	Asuncion (Paraguay)	Two armed Palestinians broke into the Israel Consulate office and shot at office employees, killing an Israeli secretary and wounding a local secretary.		The perpetrators were arrested and still imprisoned.
22.7.70	Athens and Beirut	Olympic Airways plane en route from Beirut to Athens hijacked by 6 terrorists and landed in Athens.	Popular Struggle Front	Hijackers and eight other terrorists released by Greek gov't. and flew to Cairo for hero's welcome.
6.9.70	Jordan	Three planes hijacked with 400 passengers on board. One blown up in Egypt; the other two landed in Zarka, Jordan. (Planes belonging to BOAC, TWA and Pan Am.)	Habash "Front"	
6.9.70	London-Lod	Abortive attempt to hijack an EI Al plane. In gunfight inside the plane one terrorist was killed and a female terrorist (Leila Khaled) injured. A steward (Israeli citizen) and four passengers were injured.	Habash "Front" and a Nicaraguan organization.	Injured female terrorist released by Britain in exchange for hostages subsequently hijacked in a BOAC plane.
8.9.70	Athens	A sabotage attempt against the EI Al offices ---thwarted.		Two terrorists arrested but later released in the wake of a hijacking of a plane to Jordan, 1970.
9.9.70	Bahrain-London	Another BOAC plane forced to land at Zarka, Jordan.		
6.10.70	London	Rigged letters addressed to EI Al and Israeli Embassy discovered.		
15.10.70.	West-Berlin	Rigged letters discovered at Israel Masada exhibition		
1971 14.3.71	Rotterdam	Fuel tanks at the oil docks blown up by a five-member terrorist squad. Approximately \$1 million damage caused.	"Fatah"	
26.5.71 28.5.71	Rio De Janeiro Turkey	Explosion in J.N.F. office. The Israeli Consul General murdered.	The Turkish Liberation Army	
11.6.71.	Bab el-Mandab (S. Yemen)	The Israeli tanker Cora "C" attacked in the Bab el-Mandab straits by four terrorists causing damage to the vessel.	Habash "Front"	The terrorists escaped by boat to the South Yemen coast.
20.7.71	Rome	Sabotage of "Alia" (Jordan Airlines Co.) offices causing damage.	"Fatah"	
23.7.71	Paris	A number of Molotov cocktails thrown at the Jordanian Embassy.	"Fatah"	One of the terrorists was wounded by police fire and apprehended.

Date	Place	Description	Organization	Perpetrator's Fate
24.7.71	Egypt	Attack on Jordan Airlines plane at airport. Slight damage to plane.	"Fatah"	
28.7.71	Rome-Lod	Attempt to blow up El Al plane en route from Rome to Lod by rigged suitcase brought aboard by a Dutch girl unaware of its nature.	Jibril "Front"	Girl released. The terrorist responsible got away.
August 1971	Algeria	Two terrorists hijack Jordanian plane to Algeria.	"Fatah"	Girl released
1.9.71	London-Lod	Attempt to blow up an El Al plane en route from London to Lod by rigged suitcase brought aboard by Peruvian girl unaware of its nature.	Jibril "Front"	Terrorist arrested and released a few days later.
8.9.71	Jordan	Hijacking of Jordanian plane of Alia Co. by Libyan hijacker.	"Fatah"	
16.9.71	Beirut	Abortive attempt to hijack Jordanian Alia plane flying to Beirut.	"Fatah"-Black September.	One terrorist wounded and arrested. All were released in Jan. 73.
28.11.71	Cairo	Jordanian Prime Minister Wasfi el-Tal murdered by four terrorists.	"Fatah"-Black September.	The perpetrators escaped
15.12.71	London	Jordan's Ambassador in London wounded by shots fired at him by two terrorists.	"The Jordanian National Liberation Movement".	
16.12.71	Geneva	Explosion in the building of the Jordanian Embassy. Four people wounded and slight damage caused.	Jibril "Front"	
28.12.71	Austria-Yugoslavia	Rigged letters of Yugoslavian and Austrian provenance. A police sepper wounded.		
1972				
5.2.72	Holland	A six man terrorist squad blew up two gas installations.	"Fatah"-Black September.	The perpetrator's escaped.
6.2.72	West Germany	Sabotage of a Hamburg electronics plant, causing heavy damage.	"Fatah"-Black September.	
6.2.72	Germany	Five Palestinians and a Jordanian murdered by 2 armed terrorists	Black September	
19.2.72	Cairo-Oman	Attempt to hijack a Jordanian plane en route from Cairo to Oman foiled.		
22.2.72	Far East, Europe West Germany	German Lufthansa plane hijacked by five terrorists. The plane and its passengers released after Lufthansa paid \$5 million ransom.	Habash "Front"	The terrorists left Aden after the ransom was paid.
22.2.72	Hamburg (W.Germany)	Sabotage of an oil pipeline.	"Fatah"-Black September	The terrorists escaped.
11.3.72	London	Attempt to attack King Hussein's residence, London.	Jibril "Front"	
29.4.72	Hanover W.Germany	Rigged parcels sent to the Israeli pavilion at the Hanover fair.	"Fatah"-Black September	
4.6.72	Trieste, Italy	Sabotage of oil installations by several terrorist squads operating simultaneously. Heavy damage caused.		

Date	Place	Description	Organization	The perpetrator's Fate
16.8.72	Rome-Lod	Attempt to blow up El Al plane in the air en route to Lod by bringing bomb-trapped record player aboard. It exploded in luggage hold of plane.	Jibril "Front"	Two English girls who brought the record player onto plane were released by Italian gov't. The two terrorists released on bail. Feb. '73 disappeared from Italy
5.9.72	Munich	A squad of eight terrorists seized the dormitory where Israeli sportmen were housed. In the course of the incident 11 Israeli athletes were killed.	"Fatah"-Black September.	Five terrorists killed, & 3 arrested. Terrorists released following Lufthansa hijacking in Oct. 72.
10.9.72	Brussels	An employee of the Israel Embassy was attacked and wounded.	"Fatah"-Black September	
18.9.72	Amsterdam	Rigged letters sent from Amsterdam to Israel and Israeli legations throughout the world (Paris, Geneva, Montreal, Vienna, Washington, Ottawa, Brussels, Kinshasa, Buenos Aires, Phnom penh, The Economic Advisor of the Israel Embassy was killed when an envelope addressed to him exploded.	"Fatah"-Black September	
19.9.72	London	Synagogue sabotaged.		
20.9.72 4.10.72	Buenos Aires Malaysia	Have of rigged letters from Malaysia to Jewish addresses in Israel and throughout the world. One such envelope, received by the "Hias" Jewish Welfare Agency. Other such letters sent to two Jews in Rhodesia and to the director of the N.Y. Chapter of the "Hadassah" organization. Rigged envelopes exploded in a N.Y. Post Office, wounding a U.S. postal employee.	"Fatah"-Black September	
13.10.72 17.10.72 23.10.72	Paris Rotterdam Holland	A bomb discovered in El-Al offices. A bomb was discovered in the entrance of a building housing "Bank of America" and "Zim Lines". A PLO representative in Brussels was arrested in Holland. Rigged envelopes were discovered in his possession.		The terrorist was released shortly after.
29.10.72	Germany	German Lufthansa plane seized by two terrorists who demanded release of the three Munich Murderers.	Habash "Front"	Found refuge in Libya and released from there.
30.10.72	Malaysia/Singapore	Rigged envelopes sent from Malaysia and Singapore to Israel.	"Fatah"-Black September.	
31.10.72 4.11.72	Nigeria Frankfurt	A rigged envelope received by the Israel Embassy. A rigged envelope received a Jewish Zionist Youth Group.		
11.11.72	Geneva	Five rigged envelopes received by Israeli delegation to Jewish Organizations.		

Date	Place	Description	Organization	The Perpetrators Fate
11.11.72	Britain	14 rigged envelopes received by Jewish organizations and personalities. A Jewish diamond dealer was severely wounded when one such envelope exploded.	"Fatah"-Black September	The terrorists escaped.
13.11.72.	Paris	Three armed terrorists broke into the apartment of a Syrian journalist and murdered him.		
14.11.72.	Ankara (Turkey)	American Information Center sabotaged.		
21.11.72.	Toronto	Four rigged envelopes sent to Jews in that city, discovered.		
25.11.72.	Rome	Four abandoned suitcases containing weapons discovered at Rome's airport.	Jibril "Front"	
7.12.72.	Singapore	Rigged envelopes sent to public institutions in Israel.	"Black September"	The terrorist still imprisoned
24.12.72.	London	A terrorist was arrested in his possession were weapons and explosives destined to be employed against Israeli Embassies in Scandinavia.	"Black September"	The terrorists flew to Cairo and later to London.
28.12.72.	Bangkok	Four terrorists occupy Israeli Embassy. Six Embassy employees held hostage and released by the terrorists 19 hours later.		The terrorists returned to Lebanon.
Dec. 72	Greece	A squad of terrorists discovered in Greece, their intent being to reach Israel by boat and to carry out terror and suicide missions there.		
Dec. 72	Lebanon/Europe	An automobile carrying explosives left a Fatah base in Nahr-el Bard (Lebanon) and arrived in Europe. Its cargo was to be employed in attacks against an Israeli Embassy.		
1973				
2.1.73	Kuwait/Jordan	Rigged envelopes addressed to Jordanian personalities. Jewish Agency building was sabotaged.	"Fatah"-Black September	
9.1.73.	Paris	An attempt to carry out a suicide mission in Haifa by four terrorists was thwarted. The terrorists were taken off the ship "Haspia" in Cyprus.	Habash "Front"	They were exiled to Beirut.
9.1.73.	Cyprus	An attempt to attack new immigrants' transit facilities in Vienna (Schoenau Castle) was thwarted. Three terrorists were arrested.	Black September	Received suspended sentences and exiled to Syria, March '73.
19.1.73	Vienna	Rigged envelopes sent to Israel Consulate in Chile, and to Australia and Canada (to a local Rabbi).	Black September -- "Fatah"	
24.1.73.	Greece-Chile Canada-Australia			

Date	Place	Description	Organization	The Perpetrators' Fate
26.1.73.	Madrid	An Israeli (Moshe ben Hanan) - Baruch Cohen, murdered in Madrid by a terrorist.	"Fatah"-Black September	
26.1.73.	Italy	Three terrorists arrested by Italian authorities when crossing the Italian border with intent of attacking Soviet Jewish emigrants living in a transit hotel in Vienna.	"Fatah"-Black September	The terrorists were executed.
29.1.73.	Turkey	Rigged envelopes of Turkish provenance sent to Israel.	"Fatah"-Black September	
31.1.73.	Rome-Rwanda	Rigged envelopes sent from Rome to the Israeli Embassy in Rwanda.	"Fatah"-Black September	
5.2.73.	Rome-Guatemala	Rigged envelopes sent from Rome to the Israeli Embassy in Guatemala.	"Fatah"-Black September	
8.2.73.	Germany-Central African Republic	Rigged envelopes sent from Germany to Israeli Embassy in Bangui, Capital of the Central African Republic.	"Fatah"-Black September	
1.3.73.	Khartoum	An eight man terrorist squad occupied the Saudi Arabian Embassy. Three western diplomats murdered.	"Fatah"-Black September	Eight terrorists still in Sudanese prison.
3.3.73.	Cyprus	The Cyprus passenger ship "Sunyon" sunk.	Habash "Front"	
6.3.73.	New York	An attempt to sabotage Israeli objectives in New York by means of three booby-trapped cars (one near the El Al terminal at Kennedy Airport, and two others near the New York branches of Israel Discount Bank and Bank Leumi Le Israel) was thwarted.		
12.3.73.	Cyprus	A Jewish businessman was murdered by a Jordanian student.	"Fatah"-Black September	The terrorist escaped.
14.3.73.	France	French security authorities arrested two terrorists who intended to attack the Israeli Embassy in Paris.	"Fatah"-Black September	
20.3.73.	Rome	Four abandoned suitcases containing arms, discovered at Rome Airport.		
21.3.73.	Singapore	Explosion in which an employee of the "Zim" Company was wounded.	Possibly "Fatah"-Black September	
4.4.73.	Buenos Aires	Attempt to blow up an El Al plane at Fluminio airport in Rome. Two terrorists armed with revolvers and handgrenades taken prisoner.	Habash "Front"	Terrorists released and sent to Syria, Sept. '73
9.4.73.	Cyprus	In two simultaneous terrorist actions: 1. Attempt to seize Arkia plane foiled. 7 terrorists seized. 2. The Israeli Ambassador's house was sabotaged.	"Arab Nationalist Youth for the Liberation of Palestine."	Terrorists released and left for Libya following seizure of KLM aircraft in Nov. '73.
11.4.73.	Geneva	A molotov cocktail was thrown at the El Al office.	Black September.	
12.4.73.	Seoul	Rigged envelopes sent to Israel discovered.		
24.4.73.	Rome	Three handgrenades and a mine discovered in an abandoned cardboard box.		
27.4.73.	Beirut	Explosive material discovered on board French plane in Beirut. Three terrorists arrested.	"Fatah"-Black September	Terrorists sentenced to prison terms.

Date	Place	Description	Organization	The Perpetrators' Fate
27.4.73.	Rome	Italian employee of El Al murdered by a terrorist.		Terrorist arrested, released on 14.7.75
27.4.73. 29.4.73.	Rosalia Costa Rica	A rigged envelope sent to the Israel Embassy, a molotov cocktail hurled at a synagogue	Apparently local Arabs.	
7.5.73.	Paris	An attempt by two armed terrorists to seize a room overlooking the Israel Embassy and from there to fire on the building, was thwarted.		
8.6.73. 13.6.73.	West Berlin Italy	Explosion in a weapons production plant. Two terrorists wounded in an explosion in their car near the El Al office in Rome.	"Fatah"-Black September "Fatah"-Black September	They were freed under bail. Dec. '73
1.7.73.	Washington	Col. Joseph Ayalon, Israel Air Attache, ambushed and murdered near his home.		
19.7.73.	Athens	An attempt to penetrate into the El Al office in Athens was thwarted.	Habash "Front"	The terrorist was freed and flown to Kuwait.
20.7.73.	Japan-Libya	Jumbo jet of Japanese Aviation Co. en route from Paris to Tokyo via Amsterdam, hijacked by 5 terrorists and landed in Libya. A female terrorist was killed. Plane blown up on 24.7.73. in Libya.	Habash "Front"- "Red Army"	Terrorists captured in Libya, released later.
5.8.73.	Athens	Mass killing at Athens airport, four passengers killed, 13 US citizens, 1 Austrian and 54 wounded (22 Americans, 32 Greeks; most of the TWA passengers from Israel). The terrorists who were captured said they had trained in Libya and were assigned to kill travelers who had left Israel.	"Arab Nationalist Youth Organization for the Liberation of Palestine."	Terrorists released for Libya in Feb. '74
30.8.73.	Beirut.	Two terrorists arrested at Beirut Airport en route for Czechoslovakia.	"Salqa"	The terrorists were released 5.9.73
5.9.73.	Rome.	A terrorist missile attack on an El Al plane at Rome was thwarted. 5 terrorists were arrested. In their possession were 5F-7 missiles.	"Fatah"- Black September	2 terrorists were released on bail, 30 Oct. 1973, 3 were released to Libya 1 March 74.
5.9.73.	Paris	Five terrorists that occupied the Saudi Arabian Embassy and held 11 people hostage, were freed and flown to Kuwait.	"Fatah"-Black September	The terrorists were later transported to Libya.
7.9.73.	West Berlin	The Israeli Pavilion was sabotaged at a radar and T.V. exhibition.	Black September	Terrorist freed and returned to the Middle East.
11.9.73.	Australia	A terrorist arrested in Australia	Black September	
28.9.73.	Austria	Terrorists occupied a train transporting Soviet Jewish emigrants at the Marchegg border station (on the Austrian side) and held three Jews hostage. In order to obtain their release the Austrians de-	"Salqa"	Terrorists were given a plane which flew them to Libya.

Date	Place	Description	Organization	The Perpetrators Fate
18.10.73.	West Berlin	-claimed that they would close the Schoenau-Castle transit facilities for immigrants. 4 terrorists who brought suitcase with 4 kg. explosives were arrested. Planned to attack El Al plane and hotels. Had Lebanese passports.	"Fatah"-Black September	Released 10 July 1974
25.11.73.	Beirut	Three armed terrorists boarded KLM jumbo in Beirut and gained control over it after take-off for New Delhi and Tokyo. Plane not permitted to land at several airfields. Finally landed at Dubai. Terrorists gave themselves up and were arrested.		Released and sent to Syria
27.11.73.	Geneva-Israel	Five rigged envelopes addressed to Israeli government offices and to an El Al hotel, were discovered. Three additional envelopes discovered in Israel.		
29.11.73. 14.12.73.	Holland-Israel England-Israel	Six rigged envelopes from Holland, discovered in Israel. Nine rigged envelopes sent from England to Israel discovered.		
17.12.73.	Rome	Slaughter of passengers at Fiumicino airport. Five terrorists attacked Pan American plane, killing 31 persons and wounding 40. At same time, terrorists seized a Lufthansa plane. Flew to Kuwait and gave themselves up, one of the hostages (Italian citizen) was killed.	"Arab Nationalist Youth for the Liberation of Palestine."	Terrorists handed over to Egypt and later released following hijacking of plane in Nov. 74
19.12.73	Paris	A joint call of the Habash front and Algerian and Turkish terrorist organizations was uncovered in a villa near Paris. Approximately 13 terrorists were arrested (10 of them Turkish citizens belonging to the Popular Liberation Front). They intended to kidnap the son of an Israeli diplomat and to attack the Israeli Embassy.	Habash "Front" and Turkish clandestine organization.	Released after short jail sentences.
25.12.73.	Britain	Four terrorists said to have conspired to carry out attacks arrested in Britain.	"Fatah"-Black September	The terrorists were released and turned over to Syria shortly.
30.12.73.	London	Lord Steff, a London Jewish personality, wounded in an assassination attempt.	Habash "Front"	The terrorist escaped.
31.12.73.	Geneva	Six booby-trapped parcels discovered in the railway station and neutralized.		
<u>1974</u>				
20.1.74.	London	A Libyan citizen arrested in London. It was claimed that he was to carry out an attack on the El Al offices.		He was sentenced to two years imprisonment, instead was expelled.

Date	Place	Description	Organization	The Perpetrators Fate
24.1.74.	London	An explosive charge hurled into the London branch of Bank Hapoalim.	Habash "Front"	They were freed four days later in the wake of the occupation of the Japanese Embassy in Kuwait and flew to South Yemen.
31.1.74.	Singapore	Four terrorists (two Palestinians and two Japanese) sabotaged the Shell Co. fuel depot and then occupied a boat anchored on the island.	Habash "Front" and Japanese "Red" Army.	
2.2.74.	Karachi (Pakistan)	Three terrorists occupied a Greek ship and demanded the release of the two terrorists who had carried out the Athens massacre (Aug. 73).	"Arab Nationalist Youth for the Liberation of Palestine".	The terrorists flew to Libya and were released.
6.2.74.	Kuwait	Five terrorists occupied the Japanese Embassy in Kuwait and demanded that the four terrorists who carried out the Singapore operation be permitted to leave the country.	Habash-Japanese Red Army	The terrorists who committed the act were flown in a Japanese plane from Singapore to South Yemen together with their four comrades. There they received asylum. Terrorists released in Holland after hijacking of British plane in Nov. 74
3.3.74.	Beirut-Amsterdam	Two terrorists gained control over British aircraft after take-off from Beirut and flew it to Amsterdam. Terrorists blew up the plane after passengers allowed to alight.		
14.3.74	Beirut	Six terrorists arrested at airport in attempt to smuggle arms into KLM plane that they planned to hijack.	"Arab Nationalist Youth Organization for the Liberation of Palestine". Habash "Front"	Terrorist released for lack of evidence.
29.5.74	West Berlin	Explosion near the Japanese Airlines Co. causing slight damage.		
26.7.74	Paris	A Japanese citizen arrested. In his possession were forged passports.	Japanese "Red Army" and Habash Front.	Released Sept. 74 in the wake of the attacks on the French Embassy, Hague.
3.8.74.	Paris	Three booby-trapped cars exploded in Paris slightly injuring two people. One car exploded near the Jewish Welfare Office in the center of Paris. The second one near the offices of the newspaper "L'Aurore". The third near the editorial board of the right wing newspaper "Minuit".	Habash "Front"	
26.8.74	Frankfurt-Mannheim	Explosion near the Israel Tourist Office, Frankfurt. At the same time a factory in Mannheim associated with Israeli industries was sabotaged.		

Date	Place	Description	Organization	The Perpetrators Fate
8.9.74	Greece	TWA plane en route from Lod to New York via Athens exploded in midair near the Greek coast. All 88 passengers killed.	"Arab Nationalist Youth Organization" for the Liberation of Palestine. "The Japanese Red Army"	The terrorists were released and taken to Iraq.
13.9.74	Hague	Three terrorists occupied the French Embassy and held the Ambassador and eight employees hostage. They demanded the release of the Japanese terrorist imprisoned in France. The French government surrendered to their demands.		
1.10.74.	Rabat	15 terrorists who were to assassinate King Hussein arrested in Morocco.	"Fatah"-Black September	Released and sent to Egypt.
22.11.74.	Dubai-Tunis	Four terrorists seized British plane in transit in Dubai en route for London from Far East. Finally landed plane in Tunisia. One hostage (W.German physician) killed.	Splinter group of El Fatah in Iraq.	Terrorists gave themselves up and handed over to PLO.
<u>1975.</u>				
13.1.75	Paris	Two terrorists shot rockets at El Al plane at Orly airport. They missed target but hit Yugoslav jet plane parked near the Israeli plane. Three persons wounded (7 Yugoslav, 2 French citizens).	Habash "Front"	
19.1.75	Paris	Attempted attack by two terrorists on El Al aircraft at Orly airport foiled. After police fired on them the terrorists opened small-arms fire and threw hand-grenades at public in the airport. 20 persons were injured. Terrorists seized six hostages.	Muhammed Budia Commando or Habash "Front"	Terrorists gave themselves up to Iraqi authorities.
10.2.75 4.8.75	Geneva Malaysia	Explosion in building of West German Consulate. Members of the Japanese "Red Army" occupied the American consulate and Swedish legation in the Malaysian capital holding more than 50 hostages. Japan surrendered to the terrorists demand and freed 7 terrorists imprisoned in Japan.	Japanese "Red Army"	
19.8.75	West Berlin	Rigged envelopes sent to head of the Jewish community in Berlin. The parcel exploded in a German police car without causing damage.	"Saife"	The terrorists sentenced to a year's imprisonment.
5.9.75	Holland	Four terrorists bearing Syrian passports arrested in Amsterdam. Their aim was to take about 12 railroad passengers hostage so as to eventually cut off Dutch support of Jewish immigrants to Israel.		
15.9.75	Madrid	Four terrorists broke into the Egyptian Embassy in Spain and seized six Egyptian diplomats threatening	"Fatah"	

Date	Place	Description	Organization	The Perpetrators Fate
21.12.75.	Vienna	to kill them unless the Egyptian delegation withdrew from the Geneva talks and condemned the interim agreement with Israel. Six terrorists occupied the OPEC building in central Vienna. At the time a convention of the oil ministers belonging to the organization was being held. The terrorists held the Oil Ministers and their aids. The following day the terrorists and their hostages (approx. 20) left for Algeria. Four civilians were killed (two Austrians and one Libyan and one Iraqi) and a Kuwaiti citizen was wounded. A rigged parcel exploded in the TWA building at La-guardia Airport. 14 people were killed and 75 wounded.	Habash "Front" and "Carlos".	Six terrorists surrendered themselves to Algerian authorities.
29.12.75	New York			
<u>1976</u>				
12.1.76.	New York	Three bombs were discovered near the library of the UN Headquarters. One of the bombs scheduled to go off moments before the opening of the Security Council debate on the Middle East. The bombs were dismantled.		
25.1.76.	Nairobi	Five terrorists were captured abroad when attempting to attack an El Al plane with missiles, with more than 100 passengers on board.	Wadi Hadad	5 terrorists arrested and brought to Israel.
8.2.76.	West Berlin	A bomb exploded at the Israel Bonds Office.	Germans affiliated with Habash "Front".	
17.4.76	Paris	An explosive charge went off in an office building next to the Israeli embassy.		
27.4.76.	Canada	Two terrorists arrested by Canadian police. In their possession were arms destined to be used during the Olympic games.		Two terrorists arrested.
30.5.76	Paris	Terrorist strike at Paris branch of Rothschild Bank and a French police station. Plan originally called to strike at Pro-Israel rally.		

Date	Place	Description	Organization	The Perpetrators Fate
28.6.76.	Athens-Uganda	Four terrorists seized an Air France plane. The aircraft which was en route from Lod to Rome was hijacked after having stopped at Athens. The plane landed at Libya and later at Entebbe Uganda. 246 passengers and 12 crewmen were on board. On 30 June, 46 passengers were freed. On July 1st, an additional 100 were released. 78 Israelis, dual nationals, and the plane's crew remained. On the night of July 3-4 an IDF Commando unit consisting of ground and air forces liberated the passengers in a brilliant, daring operation. One IDF officer was killed, three Israeli citizens were killed and five others wounded, and four Israeli soldiers were wounded. Several days after the operation, Mrs. Bloch a passenger of the plane was murdered after being abducted from a Ugandan hospital by Idi Amin's agents.	Madi Madad	Seven terrorists killed
10.7.76 20.7.78	Paris Gene	An explosion occurred in the Bnei Brith Office. Explosion near the Syrian airlines offices in Rome. Printed matter left behind stated that Palestinian terrorists were responsible.		
11.8.76	Istanbul	Attack upon an El Al plane by three terrorists. The plane was preparing to take off for a flight from Istanbul to Tel-Aviv. Two Israeli nationals, one American Jew, one Japanese national were killed. 18 Israeli nationals, one Swiss and two Americans were wounded. During their interrogation the terrorists told that they received passports and 5,000 dollars and were trained in Libya. Left Libya for Rome and from there to Istanbul. A Turkish policeman was wounded.	Habash Front (Madad)	Two terrorists were captured by Turkish authorities and sentenced to life imprisonment.
4.9.76	Nice (France)	A KLM plane from Madrid to Amsterdam via Nice was hijacked. On the plane were 84 passengers and 7 crew members. The plane later flew into Israeli skies demanding that terrorists in Israel be freed. After Israel refused to answer the terrorists demands the plane returned to Cyprus. The terrorists surrendered themselves to Cypriot authorities who in turn handed them over to Libyan representatives.	Jibril "Front" (Abu Abee)	The three terrorists were taken to the Libyan Embassy in Cyprus and from there to Libya.

Date	Place	Description	Organization	The Perpetrators Felt
24.9.76	Lod-Bombay	A plan to carry out attacks at Israel's Ben Gurion Airport, on Israel-bound flights, and within Israel proper, was foiled as a result of the arrest of a dutch girl, Lubina Jensen, who according to her own admission had been trained in Aden. She had been gathering information on Air-France's Paris-Tel Aviv line. A second dutch citizen Marion Nieuwenborg was arrested at Bombay Airport.	"Habash" and the Dutch Red Youth.	The woman, terrorist Lubina Jensen was arrested at Lod and the other terrorist at Bombay.
24.25. 9.76	Rome	-Arsen in a jointly owned Italian Israeli irrigation concern. -Molotov cocktail in "Nias" Rome office. -Molotov cocktail in a Lebanese Maronite monastery. The molotov cocktail did not explode.	"Assan Kanfani" Anti-Zionist Commando.	
26.9.76.	Damascus	Three terrorists attacked the "Spiranils" hotel in central Damascus, killing 6 of the 90 hostages they took and wounding an additional 34. The commander of the Syrian commando unit died in the rescue mission. The terrorists demanded the freedom of terrorists arrested by the Syrian authorities. Explosion in an Israeli restaurant.	"Abu Nidal" (Black June)	The three terrorists were executed by the Syrians.
4.10.76.	West Berlin	Three terrorists attacked the Syrian Embassy in Rome and captured it. However, they surrendered after two hours. An attempt was also made to gain control of the Syrian Embassy in Pakistan.	"Abu Nidal" (Black June)	The three terrorists were
11.10.76.	Rome and Pakistan	Plastic bomb explosion in the El Al building which caused slight damage.	"Abu Nidal" (Black June)	Three terrorists were killed. One was wounded and placed under arrest.
6.11.76.	Istanbul	Four terrorists attacked the Intercontinental Hotel in Aman. Their mission was to capture the hotel and take hostages. In the terrorist attack two hotel workers were killed and two guests (from Holland and America) were wounded. In addition, a Jordanian civilian was wounded. In a counter attack the Jordanian army recaptured the building, killing 3 of the terrorists and another. A Jordanian officer and soldier were killed and one soldier wounded.		
17.11.76.	Aman	Assassination attempt made on the life of the Syrian Foreign Minister, Hladan.	"Abu Nidal" (Black June)	Palestinian students affiliated with the Organization were arrested.
2.12.76	Damascus	An attempted attack on the Syrian Embassy in Istanbul was thwarted.	"Abu Nidal" (Black June)	
13.12.76.	Istanbul			

Date	Place	Description	Organization	The Perpetrators Fate
15.2.77.	Paris	The manager of the Arab library in Paris, Mahamud Zalah was murdered either by right-wing Palestinian party members or opponents of the "Rejectionist Front".		
20.4.77.	Genoa	A Jerry-rigged letter bomb was discovered at the "Zis" offices in Genoa. The letter-bomb was discovered before it could cause damage.		
6.5.77.	Beirut	A Norwegian student was arrested at Beirut's airport when he was about to board a plane bound for Frankfurt. He was to have eventually planted a bomb in Israel.	"Democratic Front for the Liberation of Palestine."	The terrorist was arrested.
12.5.77	Teheran	Two Iranians attempted to break into the building which houses the Jewish Federation. They did not succeed.	Iranian Underground	Both terrorists were killed after an exchange of fire with policeman.
8.7.77.	Beirut	Six terrorists hijacked a Kuwaiti airliner which was on its way from Beirut to Kuwait. The plane landed in Kuwait; the terrorists released the passengers and flew to Damascus. They demanded the release of 300 terrorists imprisoned in Arab states.	"Abu Nidal" (Black June)	The terrorists surrendered to Syrian authorities.
12.7.77	Sweden	A young Japanese man was arrested by Swedish police. He planned a terrorist strike against the OPEC Ministers meeting in Stockholm.	"Japanese Red Army"	The young man was arrested.
25.7.77	Washington D.C. (U.S.A.)	An explosive charge was discovered at the home of the head of the Jewish Lobby. There were no injuries and security was increased.		

Date	Place	Description	Organization	The Perpetrators Fate
29.9.77- 5.10.77	Bengla Desh	Hijackers forced a Japanese airliner en route to Turkey from Paris to land at Bengla Desh. The hijackers demanded the release of 6 imprisoned comrades and a ransom of 6 million dollars. They flew to Kuwait, Damascus, and Algeria where they surrendered themselves to authorities after their demands had been met. The terrorists had apparently been trained in Algeria.	"Japanese Red Army"	
13.10.77.- 18.10.77.	Majorca	A Lufthansa airliner carrying 87 passengers and crew was hijacked en route from Majorca to Frankfurt. The plane was flown via Rome to Larnaca, Cyprus and from there to Dubai, Aden, and Somalia. The hijackers who demanded a ransom and the release of imprisoned comrades in Ankara and Germany, killed the plane's captain. On the night of 17-18 the hostages were released by an operation staged by German commandos in Somalia.	Wadi Haddad in conjunction with the Baader Meinhoff terrorist organization.	Three male terrorists killed and a female terrorist wounded.
20.11.77.	Cannes (France)	An explosive charge discovered in a hall where a French-Israeli meeting was taking place.		
27.11.77.	Paris	An explosion occurred at the Paris branch of the Bank Leumi of Israel. The building suffered damage.	Tej-el Z'atir group.	
29.11.77.	Ankara	An explosive charge was discovered at the entrance to the Egyptian Embassy building in Turkey. There was no damage.		

Date	Place	Description	Organization	Perpetrator's Fate
6.12.77	Caracas (Venezuela)	An explosive charge went off near the Egyptian Embassy Building. Placards condemning Sadat's policies were found nearby.		
25.12.77	Copenhagen	Arsen committed at the Egyptian national airline.	"Habash "Front"	
1978	Bonn	Explosive charges were discovered next to a fuel tank used to heat the Egyptian Embassy.		
1.1.78	Belgium	Two bazookas including launchers, were discovered aimed at the Israeli Embassy in Brussels. The weapon was dismantled.	Possibly the Madl Mammad group.	
4.1.78	Venezuela	An explosive charge went off near the office of the Federation of Jewish Organizations. Property damage.		
12.1.78	France	Two times blew up in the car carrying the Egyptian ambassador and his advisor. The advisor was seriously wounded.		
16.1.78	West Germany	A bomb, packed in a suitcase, was placed near the entrance to the Egyptian Tourist Office & destroyed office facilities.	Arab Revolution Army, Palestine Command, (apparently fictitious name which had been mentioned at the time of an assassination attempt on Syrian Foreign Minister Khadam Oct. '77).	The 2 terrorists were surrendered after the liberation of hostages.
26.1.78-10.2.78	Holland	Symptoms of poisoning discovered in 5 children who had eaten Israeli oranges. Warning letters sent to various nations by Palestinian sources.		
1.2.78	France	An explosive charge planted near the Paris building of the Discount Bank went off.	"Abu Nidal" (Black June)	
18.2.78	Cyprus	Two terrorists murdered Yusef-el-Sibai, head of the Organization for African-Asian Solidarity. (was also the editor of Al Ahram and Sadat's personal friend). The terrorists gained control of a plane with 60 hostages aboard. An Egyptian force undertook to capture the plane and free the hostages. During the operation, 15 Egyptians were killed.		
1.3.78	London	An arsen attempt was made on an Israeli tourist office.		
4.3.78	Belgium	The Iraqi Embassy in Belgium was sabotaged. Only structural damage to building.	"Fatah"	
30.3.78	West Berlin	Time-bomb planted near an ET Al office was dismantled by a demolition expert.		

Date	Place	Description	Organization	Perpetrators' Fate
20.5.78	Only airport, Paris	Three terrorists, who apparently arrived from Tunis, attacked passengers waiting at the El Al terminal. A French policeman and a civilian were killed. 2 others were wounded.	"Habash-Front"	Terrorists were killed.
20.6.78	Frankfurt, West Germany	An explosion near Lorexco's Frankfurt office caused extensive damage to the building	"Revolutionary cells" (West Germany)	
24.7.78	Belgium	The Iraqi Embassy Building in ... alium was sabotaged. Only property damage.	"Fatah"	Woman terrorist arrested.
28.7.78	Britain	An aborted attempt was made to assassinate Iraqi Ambassador to Britain.	"Fatah"	
31.7.78	France	In a takeover of the Iraqi Embassy in Paris, an Iraqi representative and a French policeman were killed. 2 other people were wounded.	"Fatah"	
2.8.78	Karachi	An aborted assassination attempt was made on the life of the Iraqi Consul in Karachi.	"Fatah"	
7.8.78	Belgium	A "Fatah" terrorist who was assigned to attack the Iraqi Embassy in Brussels surrendered to Embassy personnel.	"Fatah"	
20.8.78	London	A bus carrying 20 El Al crew members was attacked by terrorists. A stewardess was killed and 3 crew members were wounded.	Wadi Hadad	1 terrorist killed 8 another imprisoned in England. 3 escaped.
22.8.78	Denmark	A molotov cocktail was thrown at the Israeli Embassy in Copenhagen.		
8.9.78	West Germany & Britain USA	Letter bombs were sent out from Rome to the Iraqi Embassy in Bonn, London, and Washington. The envelopes were discovered and neutralized. No damage.		
30.9.78 15.10.78	Turkey West Germany	Sabotage in the Egyptian Consulate & also in Israeli Embassy in Istanbul Two explosive charges discovered in West Berlin. One charge was planted in the Jewish Community Building and another next to a Jewish owned store.	"Saïqa"	
15.10.78	West Germany	An explosive charge was discovered next to a Jewish owned store in West Berlin.	"Saïqa"	
<u>1972</u>				
25.3.79	Syria	Two small explosive charges were thrown at the American Embassy in Damascus. No wounded.	possible "Saïqa"	
26.3.79	Ankara, Turkey	An explosive charge was thrown into the yard of the Israeli Consulate.		
27.3.79	Paris	A bomb exploded in a Jewish restaurant. 26 people injured.	"Saïqa"	
27.3.79	Paris	Explosion in a cosmetics shop under Jewish ownership.	"Saïqa"	
29.3.79	Turkey	An explosive charge was thrown at the courtyard of the American Embassy in Istanbul; A consul's car was also sabotaged. No injuries.	"Saïqa"	

Date	Place	Description	Organization	Perpetrators' Fate
1.4.79 2.4.79 3.4.79	Turkey Lebanon West Germany	Attempted attacks on El Al Building in Istanbul. The American Embassy in Beirut suffered a rocket attack. A package exploded in Frankfurt airport. The package was addressed to a school in Israel and was designed to explode when opened. 10 people were wounded. A bomb exploded in the Israeli Embassy Building. Tourist office representing the Egyptian airline was sabotaged.	Possibly "Sa'iq"	
5.4.79 5.4.79	Greece Cyprus	French police disarmed a time... bomb, hidden in a motorcycle which parked outside a theatre showing a film titled "Jewish Culture Week". An explosive charge went off at the Israeli Embassy. No injuries.	Possibly "Fatah" "Sa'iq"	
7.4.79	Paris	An attack on an El Al plane at Brussels airport was thwarted. The terrorists instead attacked the passengers in the airport's lounge. 12 foreign passengers were wounded. The terrorists embarked on their mission from Lebanon.	"Sa'iq"	
8.4.79	Ankara		Possibly "Sa'iq"	2 terrorists were captured and a third escaped.
16.4.79	Belgium		"Fatah" (possibly) with cooperation of Habash.	
16.4.79	Egypt	Two terrorists planned to sabotage the Egyptian Foreign Office Building, the Sheraton Hotel, a police station and an immigration office.	"Sa'iq"	2 terrorists arrested
16.4.79 19.4.79	Lebanon Egypt	Sabotage at the Kennedy Centre in Beirut. 40 wounded. A bomb-letter went off at the Cairo post office. One person was killed and 3 wounded.	"Sa'iq"	
22.4.79	Austria	An explosion occurred at the Jewish Community Centre and Vienna Synagogue. No people were wounded.	Sa'iq	
26.4.79	West Berlin	An attempt to sabotage fuel tanks and murder Berlin's Jewish community leader was thwarted.	"Fatah"	8 terrorists arrested
26.4.79	Italy	A terrorist was arrested at the Rome airport while on his way to Switzerland with 12 detonators. An additional 5 terrorists were later arrested and deported.	"Fatah"	The terrorist was arrested

Date	Place	Description	Organization	Perpetrator's Fate
27.4.79	West Germany/ Holland	Two terrorists travelling with 60kgs of explosives were arrested in Bayern, while on their way to sabotage fuel installations in Rotterdam.	Fatah	2 terrorists arrested
29.4.79	West Germany/ Holland	Two armed terrorists were arrested when trying to cross into Germany from Holland. The two were related to two other terrorists who were apprehended when attempting to blow up fuel tanks at Rotterdam.	"Fatah"	2 terrorists arrested
11.5.79	Paris	A Palestinian was arrested at Paris airport. In his suitcase was found 45 kgs of explosives.	"Fatah"	Terrorist arrested.
14.5.79	Turkey	A plot to kidnap the Israeli and American Consuls in Istanbul was uncovered.	A Turkish clandestine organisation maintaining ties with "Fatah"	2 terrorists killed 8 2 others arrested
15.5.79	Ankara	A volley of shots was fired at the Israeli Embassy in Ankara. No casualties.	"Revolutionary cells" which maintain ties with Palestinian terrorist organizations.	
15.6.79	West Germany	A truck belonging to a Frankfurt transport company was sabotaged. The company had associated with Agreco.	"Safqa"	4 terrorists arrested by Turkish authorities
13.7.79	Ankara	Four terrorists attacked the Egyptian Embassy taking 20 hostages. Two Turkish policemen and an Egyptian Embassy employee were killed. Two Egyptian security men were wounded. Hostages freed after negotiations. A hand grenade was tossed at the German Embassy. No casualties.		
24.8.79	Beirut	An explosion occurred in the offices of Lufthansa Airlines.		
25.8.79	Beirut	No casualties.		
4.9.79	Beirut	An explosion in the offices of Lufthansa Airlines caused damage.	"Avenging Palestinian Youth"	
27.9.79	Bolivia	A bomb was thrown from a passenger car towards the Israeli Ambassador's residence in La Paz. No casualties.		
27.9.79	Bolivia	A hand grenade was thrown at the Egyptian Embassy in La Paz. No casualties.		
3.10.79	Argentina	A bomb exploded in a Rabbinical seminary in Buenos Aires. An additional explosive charge was discovered in the central school. No casualties but damage caused.		

Date	Place	Description	Organization	Perpetrators' Fate
13.11.79	Portugal	In an unsuccessful assassination attempt, the Israeli Ambassador in Lisbon, was wounded. A Portuguese Embassy guard was killed. The Portuguese chauffeur, a policeman and a passerby were killed. Three members of the Habash "Front" were arrested in Berlin.	The "International Workers Organization"-Portuguese terrorist group Habash "Front"	Terrorists arrested
14.11.79	Italy	A Palestinian terrorist who was smuggling two shoulder missiles, was captured along with two Italian terrorists. The Palestinian had transported the missiles aboard the Lebanese ship Sidon and gave them to "The Workers' Autonomy Group" which maintained connections with the Red Brigade.	Worker Autonomy Organization with ties to The Red Brigade	Terrorists captured and brought to trial.
21.11.79	Italy	Two terrorists were arrested at Fiumicino Airport en route from Beirut to Paris. They were carrying explosives and hashish at the time of their arrest. A third terrorist associated with them, was arrested in Paris.		Terrorists arrested
30.11.79	Austria	An act of sabotage was committed in a Salzburg Hotel where an informatory meeting on Israel was taking place. Four individuals wounded.		
4.12.79 10.12.79	Bahrain Rome	Sabotage in the offices of KLM and Gulf Air (El Manamah). Two explosions occurred near the offices of British Airways, El Al, and Philippine Airlines. Nine individuals were wounded (4 Italians, 2 Canadians, 2 Maltese, and a German priest).	New Armenian Opposition Movement	
12.12.79	San Salvador	A bomb went off in the Israeli Embassy, causing structural damage.	A leftist underground organization	Terrorist arrested
14.12.79	London	An Iraqi national carrying explosives was arrested at Heathrow Airport. He had arrived from Beirut. The terrorists had connections with the IRA, and was to have participated in a series of London bombings, which were to have occurred on Christmas.		
1980				
2.1.80	Turkey	The manager of the El Al office in Turkey, "Braham Elazer, was murdered by three men, while parking his car.	Marxist Unit of Warfare Propaganda, faction of Popular Front for Liberation of Turkey, with possible cooperation of Palestinian terrorists.	

Date	Place	Description	Organization	Perpetrators	Fate
17.1.80	London	A terrorist was killed when planting a bomb in the Mount Royal Hotel. An additional terrorist was wounded. Five hours later an additional bomb went off at the same hotel.	Hadi Hadad group	Terrorist killed	Terrorist killed
29.1.80	Paris	An explosion in the Syrian Embassy killed one Embassy employee and wounded 8 individuals (7 female Embassy employees and a French citizen).	Hadi Hadad Group	Terrorist killed	Terrorist killed
16.2.80	Greece	A Leftist terrorist group, planning to attack the American and Israeli Embassies in Athens, was arrested. The terrorist had trained in PLO camps in Lebanon.	An operation of the Popular Front	11 individuals arrested, Greeks, Cypriots, and a French girl	11 individuals arrested, Greeks, Cypriots, and a French girl
18.2.80	Italy	An explosion near the El AL office in Rome caused damage to the building.	Armenian organization		
27.2.80	Bogota, Columbia	Terrorists attacked the Dominican Republic Embassy in Bogota, and took diplomats hostage, including the Israeli Ambassador.	M16 - Columbian terrorist organization.		
3.3.80	Madrid	A terrorist murdered a Spanish lawyer and wounded his daughter. The terrorist had intended to murder the honorary president of the Jewish Community.	Abu Nidal (Black June)	Terrorist arrested	Terrorist arrested
21.4.80	Switzerland	A rigged suitcase was discovered in the possession of a German youth as he was to have boarded an El Al plane en route to Israel. Another German citizen connected with terrorist organizations, had proposed that the suitcase be "smuggled" into Israel. A barometer in the suitcase was to have operated an explosive device when the plane would have been airborne.	Hadi Hadad group	1 terrorist arrested while another escaped	1 terrorist arrested while another escaped
29.4.80	Egypt	An explosion occurred in a Cairo Synagogue.	An Egyptian organization named "Egyptian Awakening".		
23.5.80	Guatemala	One of the heads of the Guatemala Jewish community was murdered.	Local organization		
14.6.80	Rome	Three Molotov cocktails exploded near the offices of Alia (Jordanian Airlines).			
June 1980	Paris	Five German terrorists associated with Hadi Hadad's organization were arrested before they were able to perpetrate a terrorist attack. They had received explosives from the South Yemenese Embassy.	A German terrorist organization and Hadi Hadad group.	Terrorists arrested.	Terrorists arrested.

Date	Place	Description	Organization	Perpetrators' Fate
20.6.80	Copenhagen and Sweden	An attempt to attack El Al personnel in Copenhagen was thwarted. A Swedish man and woman were arrested at the border between Sweden and Denmark. They were in possession of a submachine gun and handgrenade. A third Swedish citizen was also arrested. The original 1979 pair had trained in a PLO camp in Beirut in December 1979 and June 1980. In May 1980, they had flown from Copenhagen to Tel Aviv on a mission for the Jibril Front in an effort to examine the Israeli security measures.		
18.7.80	Paris	In an unsuccessful attempt to assassinate Iran's former Prime Minister, Shapur Bahtiar, two French policemen and a Jewish woman were killed.	"Fatah"	Three terrorists were arrested, two terrorists were apprehended a day later.
27.7.80	Belgium	A terrorist threw a handgrenade at a group of Jewish children near the Agudat Israel (Orthodox religious group) offices in Antwerp. A French boy was killed and 16 Jews were wounded (among them 5 children and youth) and 3 Israelis. The terrorists had also intended to attack El Al travellers in Brussels and Antwerp.	Possibly "Fatah"	Two terrorists arrested

Date	Place	Description	Organization	Perpetrators' Fate
7.8.80	Argentina	An explosive charge went off near the Buenos Aires "Jerusalem Synagogue".		
8.8.80	Istanbul	An explosive device was discovered in front of the Israeli Consul's residence in Istanbul.		
4.10.80	Paris	An explosive charge went off near the Reform synagogue on Copernic Street. Three people were killed (an Israeli visitor and two French civilians). Twenty persons were wounded.		
25.11.80	Paris	A terrorist attacked a travel agency ("Airtours") which specializes in tours to Israel and Egypt. The manager of the agency and his wife (both Jewish) were murdered. A local employee was slightly wounded.		The terrorist escaped.
31.12.80	Nairobi	An explosive device exploded in the "Norfolk" hotel. As a result a large fire erupted which caused the deaths of 20 persons and injured 85 others.	(Probably Habash "Front")	
16.2.81	Beirut	Three people were killed (2 Jordanians and one Lebanese) during an attack by 20 "Revolutionary Eagles" members, on the residence of the Jordanian Charge d'Affaires in Beirut (Hussein Muhsein). The Jordanian diplomat was dragged to a car and kidnapped. In April 1991, he was returned to Jordan.	(Probably "Saiga")	
16.2.81	Cairo	Three Palestinians and two Egyptians suspected of conspiracy to blow up the Israeli Embassy and a synagogue in Cairo were accused by the Egyptian prosecutor's office. One of the Palestinians had been sent to Egypt by Syrian Intelligence, and the four others had received instructions from Fatah.	Fatah	The five terrorists were arrested.

Date	Place	Description	Organization	Perpetrators' Fate
1.5.81	Vienna	Heinz Mittel, president of the Austria - Israel Friendship Association and a member of the Vienna city council, was murdered.	"Black June"; Abu Nidal faction of the PLO.	
15.5.81	Rome	An explosive charge went off near the El Al offices in Rome.	"15th of May Arab Movement for the Liberation of Palestine".	
16.5.81	Istanbul	An explosive charge went off next to the El Al office.	"15 of May Arab Movement for the Liberation of Palestine".	
1.6.81	Brussels	The PLO representative in Brussels (Daim Nader) was killed.	"Black June".	
22.6.81	Pireus	A Greek travel agency was attacked by small arms fire. Two people were killed and 70 wounded.	Kabash "Front"	
29.7.81	Vienna	Austrian police captured 2 terrorists who came to Vienna from Beirut in an Austrian Airlines plane. The 2 terrorists were heavily armed (with "scorpion" machineguns, 4 Kalachnikov rifles, 19 cartridges and 6 hand grenades). One of the terrorists carried an Iraqi passport and the other a South Yemen passport. The terrorists could have planned to attack Sadat and Kreisky during their planned meeting in August.	Fatah	The two terrorists were captured, tried and released. The PLO representative in Austria was also expelled.
1.8.81	Poland	Attempted assassination on the terrorist, Abu Deoud (senior adviser to Abu Iyyad). The terrorist was seriously wounded.	(Probably "Black June")	
9.8.81	Rome	An explosive charge went off next to the El Al office at Rome's airport. A local employee (Italian civilian) was wounded. The office was heavily damaged.	"15th of May Arab Movement for the Liberation of Palestine".	

Date	Place	Description	Organization	Perpetrators' Fate
9.8.81	Athens	Two explosive charges were thrown at the Israeli Consulate building. The gate at the Israeli mission was slightly damaged.	"15th of May Movement for the Liberation of Palestine".	
10.8.81	Vienna	Two explosive charges went off in the garden of a building situated next to the Israeli Embassy. A resident of the house was wounded.	"15th of May Arab Movement for the Liberation of Palestine".	
29.8.81	Vienna	Terrorists attacked a synagogue in Vienna (by throwing hand grenades and firing from machineguns. Two Jews were killed (one man and one woman) and 19 were wounded (including 2 Jewish children and 2 Austrian policemen).	"Black June"; Abu Nidal faction of the PLO.	
23.9.81	Cyprus	Two handgrenades were thrown at "ZIN" offices. Five local employees (Cypriots) were wounded. The office was heavily damaged.	"Black June"; Abu Nidal faction of the PLO.	
7.10.81	Rome	An explosive charge went off in front of a building in which the El Al office in Rome is located. 8 people were wounded. The reception hall and its equipment were badly damaged.		
7.10.81	Rome	An explosive charge went off near a post office in Rome, a usual gathering place of Jewish immigrants from Russia in the evenings. 2 immigrants were wounded.		
20.10.81	Antwerp	A car exploded opposite the Jewish Portuguese community synagogue in Antwerp, 20 minutes before Shabbat Torah prayer was scheduled to have started. 3 people were killed and 100 wounded.		

Date	Place	Description	Organisation	Perpetrator's Fate
5.1.82	Rome	Italian police arrested Nazi al-Tanami and Brigitta Bargendham (a German) at the airport. They carried explosive material intended for use in an attack on the Israeli Embassy in Bonn.	PFLP	
9.1.82	Istanbul	An explosive device was detonated in front of the El Al office; the building was damaged.		
12.1.82	Guatemala	A bomb was thrown at the Israeli Embassy.		
15.1.82	West Berlin	An explosive device went off in a restaurant owned by an Israeli; a 14-month old baby was killed, 24 others wounded and the building destroyed.		
4.2.82	Vienna	An explosive device went off in the doorway of the home of the Chief Rabbi.		
29.3.82	Rome	Italian police discovered a bomb near the El Al office.		
30.3.82	Athens	The Greek army intercepted a letter-bomb addressed to the Israeli Embassy.		
31.3.82	Berlin	A Palestinian terrorist carrying explosive material was arrested on suspicion of attempting a terrorist attack.		
31.3.82	Paris	3 terrorists attacked the office of Israel's Ministry of Defence mission.		
3.4.82	Paris	Israeli Embassy attaché, Ya'acov Bar Simantov, was murdered outside his home.		
3.6.82	London	Israel's ambassador to Great Britain, Shlomo Argov was shot and critically wounded outside the Dorchester Hotel.		



I.D.F. Spokesman

July 1983

SUMMARY OF OVERSEAS TERRORIST ACTIVITY

8 June 1982 - 22 June 1983

<u>Date</u>	<u>Place</u>	<u>Description of Attack</u>	<u>Perpetrator</u>
8 June 1982	Zurich	Explosive charges went off in Israeli and US consulates.	Possibly "Revolutionary Cells," German organization with PLO connections.
18 June 1982	Rome	Explosive charges went off in offices of the Israel-Italy trade mission; American Express; and Aid Association for Jewish Emigrants from the USSR.	Unknown.
24 June 1982	Rome	Explosive charge went off inside a travel agency, formerly Israeli-owned.	Unknown.
25 June 1982	Vienna	Explosive charge was planted near home of a member of Israel-Austria Friendship League.	Possibly neo-Nazi group.
29-30 June 1982	Copenhagen	Windows of Israel Tours offices were smashed.	PLO activists.
2-3 July 1982	Athens	Bomb was thrown at shop owned by an agent of Amcor, an Israeli company.	Greek EKA group, on behalf of PLO
5 July 1982	Zurich	Shots were fired into hotel room occupied by a group of Israeli tourists.	Unknown.
18 July 1982	Padua, Italy	Premises belonging to American electronics company, Honeywell, were sabotaged by terrorist group claiming that the company supplies computers to the IDF.	"Communist Confrontation Front"
18 July 1982	Venice	Bomb exploded in front of Israeli pavilion at Venice International Festival causing minor damage.	Unknown.
20 July 1982	Paris	Molotov cocktail was thrown at entrance to building housing Bank Leumi.	Unknown.
20 July 1982	Paris	Explosion occurred in northeastern Paris building housing a company representing Israeli electronics companies, including Tadiran.	Unknown.
28 July 1982	Salzburg	Explosive charge was thrown into a Jewish-owned shop.	Neo-Nazi group supporting PLO.

- 2 -

<u>Date</u>	<u>Place</u>	<u>Attack</u>	<u>Perpetrator</u>
31 July 1982	Vienna	Damage was done to a Jewish-owned shop.	Neo-Nazi group supporting PLO.
31 July 1982	Munich	Bomb exploded in a suitcase at Munich Airport outside a passenger hall serving El Al and other airlines, injuring 7 people including 4 Israelis.	Possibly "Justice for the Palestinian Organizations."
1 Aug. 1982	Paris	Shots were fired into a parked car owned by an Israel Embassy employee in Paris.	"Direct Action," organization with PLO connections.
1 Aug. 1982	Vienna	Attack on Jewish-owned Winter Bank.	Neo-Nazi group supporting PLO.
2 Aug. 1982	Colombia	Bomb was thrown at residence Israeli Ambassador in Bogota.	"19 Movement," Colombian leftist underground organization with PLO connections.
7 Aug. 1982	Istanbul	Death plot foiled by capture of 3 terrorists in possession of plans to murder a number of Turkish Jews and blowup El Al offices in Istanbul.	Fatah
7 Aug. 1982	Paris	Explosion occurred in Rothschild Bank branch of Discount Bank.	Direct Action.
9 Aug. 1982	Paris	Attack on Goldenburg Restaurant, killing 6 people and injuring 22.	Apparently "Black June," Abu Nidal's organization.
10 Aug. 1982	Paris	Explosion occurred at GMB trading company which imports fruit from Israel, seriously injuring 1 passerby.	Direct Action or Black June.
12 Aug. 1982	Guatemala	Bomb was thrown at building housing Israeli Embassy.	Unknown.
21 Aug. 1982	Paris	Explosive charge went off under vehicle owned by the American commercial attache.	"Revolutionary Cells," organization apparently affiliated with Wadi Hadad.
31 Aug. 1982	Tokyo	Car owned by the Israeli Ambassador was set on fire.	"Revolutionary Workers on Behalf of the Revolution and Against Operation Peace for Galilee," a Japanese organization.

- 3 -

<u>Date</u>	<u>Place</u>	<u>Attack</u>	<u>Perpetrator</u>
15 Sept. 1982	Rome	Bomb exploded next to the central synagogue while congregation was being addressed by David Levy, Israel's Deputy Prime Minister.	Unknown.
16 Sept. 1982	Madrid	Assassination attempt was made on the First Secretary of the Kuwaiti Embassy, injuring a local driver.	Black June.
16 Sept. 1982	Pakistan	Attack on Vice Consul of Kuwait in Karachi.	Apparently Abu Nidal.
17 Sept. 1982	Paris	Explosive charge went off in car carrying a representative of Israel's Defence Ministry and 2 members of his family, injuring them and 43 students in a nearby high school.	"Lebanese Revolutionary Factions," organization apparently affiliated with Wadi Hadad.
18 Sept. 1982	Brussels	Shots were fired at the central synagogue during prayer services on Rosh Hashana, injuring the synagogue warden and 2 security guards.	Possibly "Black Lebanon."
23 Sept. 1982	Colombia	Attack on resident of Israeli Ambassador in Bogota, aimed at taking the ambassador and his family hostage and blowing up the residence.	19 Movement.
27 Sept. 1982	Frankfurt	Bomb exploded in front of travel agency specializing in tours to Israel, killing 1 person and injuring another.	Unknown.
27 Sept. 1982	Frankfurt	Bombs exploded in front of German travel agency handling tours to Israel and near the offices of the Iranian airline company, causing considerable damage.	Unknown.
27 Sept. 1982	West Berlin	Bomb exploded near building housing, among others, Sperry, an American computer company which manufactures equipment used to produce weapons for export to Israel.	Unknown.
28 Sept. 1982	Frankfurt	Bomb was placed below the window of offices housing the Iraqi airline company.	Unknown.

- 4 -

<u>Date</u>	<u>Place</u>	<u>Attack</u>	<u>Perpetrator</u>
30 Sept. 1982	Milan	Bomb exploded at entrance to the synagogue and offices of the Milan Jewish community.	Possibly "The Armed Communist Fire Group."
9 Oct. 1982	Rome	Attack on Rome synagogue at the close of Simhat Torah festival services, killing a 24 year-old child and injuring 33 people, including 2 Israelis.	Apparently Black June.
20 Oct. 1982	Rome	Bomb exploded outside Embassy of Lebanon, injuring a passerby.	"International Proletarian Communist Party."
4 Nov. 1982	Rome	Jewish-owned furniture store was set on fire.	Unknown.
22 Nov. 1982	Greece	Terrorist plot foiled by capture of two Palestinians possessing six kilograms of explosives attempting to cross the border from Turkey to Greece.	Unknown.
26 Nov. 1982	Ecuador	Bomb exploded in suitcase placed on staircase in the building housing the Israeli embassy in Quito, killing 2 local policemen and a woman.	Unknown
2 Dec. 1982	Colombia	Attack on synagogue by 12 armed Palestinians wearing masks bearing the letters PLO, who abused the worshippers and set the Torah scrolls on fire.	Unknown
7 Dec. 1982	Athens	Hand grenade was thrown at the offices of the Kuwaiti airline company.	Unknown.
23 Dec. 1982	Sydney	Explosion occurred at entrance to the offices of the Israeli consulate, injuring 3 local residents and causing extensive damage.	The "Organization for the Liberation of Lebanon from Foreigners."
23 Dec. 1982	Sydney	2 bombs exploded in underground parking lot, 5 kms. from the Israeli consulate, destroying several parked vehicles.	The Organisation for the Liberation of Lebanon from Foreigners.
18-19 Jan. 1983	Mexico	Attack on residence of Israeli Ambassador to Mexico was foiled.	Unknown
4 Mar. 1983	Marseilles	Jewish-owned store was set on fire.	Antisemitic group.

- 5 -

Date	Place	Attack	Perpetrator
8 Mar. 1983	Paris	Bomb exploded in car near the central Paris synagogue, killing the 2 terrorists in the car who were taking the bomb to the synagogue.	Antisemitic group.
20 Mar. 1983 (disclosure date)	Portugal	Attack on the Israeli ambassador was foiled; 2 people were arrested as they were about to throw grenades onto the ambassador's limousine.	Portuguese leftist group.
10 Apr. 1983	Portugal	Dr. Issam Sartawi, member of Palestinian National Council and Arafat's chief liaison officer for contacts with Israeli leftists, was shot to death by an assassin in the foyer of the hotel where the Socialist International was meeting.	
13 Apr. 1983	Athens	Explosion of a booby-trapped car parked near the Saudi Embassy. A diplomat and his chauffeur were injured.	Unknown
18 Apr. 1983	Tunisia	A 6-year old Jewish boy, playing near his house, was stabbed in the neck by an Arab terrorist.	Unknown
17 May 1983	Athens	Explosion near the Syrian Embassy. A car was damaged near the school of the children of Libyan diplomats.	Unknown.
7 June 1983	Barcelona	An assassin shot two PLO activists, medical students, in central Barcelona. The assassin fled the scene.	Unknown.
21 June 1983	Cyprus	Customs officials at Larnaca airport confiscated Kalachnikov guns from eight terrorists upon their arrival from Greece.	
22 June 1983	Greece	A Boeing 707 aircraft, leased by Libya, took off from Rome after being hijacked by two armed Lebanese, over Greek skies. The aircraft, with 83 passengers and 11 crew members aboard, was apparently en route from Athens to Tripoli when it was hijacked.	"Black Barots"- a Lebanese Maronite Christian group

298/24.7.83/3.10.07

CONSEIL DE L'EUROPE
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ÉTAT DES SIGNATURES ET DES RATIFICATIONS
CHART OF SIGNATURES AND RATIFICATIONS

Titre / Title : N° 90 CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME
EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

Date et lieu de signature / Date and place of signature 27. I. 1977, Strasbourg

Conditions d'entrée en vigueur / Conditions of entry into force 3 ratifications

Date d'entrée en vigueur / Date of entry into force 4. VIII. 1978

Etats membres Member States	Date de signature par chaque Etat Date of signature by each State	Ratification, acceptation, approbation ou adhésion Ratification, acceptance, approval or accession		Réserves et déclarations Reservations and Declarations		
		Date de dépôt de l'instrument Date of deposit of the instrument	Date d'entrée en vigueur Date of entry into force	Dispositions conventionnelles Treaty provisions	Application territoriale Territorial Application	Retrait ou modification Withdrawal or modification
Autriche Austria	27. I. 1977	11. 8. 1977	4. 8. 1978			
Belgique Belgium	27. I. 1977					
Chypre Cyprus	27. I. 1977	26. 2. 1979	27. 5. 1979	X ✓		
Danemark Denmark	27. I. 1977	27. 6. 1978	28. 9. 1978	X ✓	X ✓	
France France	27. I. 1977			X ✓		
Rép. Féd. d'Allemagne Fed. Rep. of Germany	27. I. 1977	3. 5. 1978	4. 8. 1978	X	X	
Grèce Greece	27. I. 1977					
Islande Iceland	27. I. 1977	11. 7. 1980	12. 10. 1980	X ✓		
Irlande Ireland						
Italie Italy	27. I. 1977			X ✓		
Liechtenstein Liechtenstein	22. I. 1979	13. 6. 1979	14. 9. 1979			
Luxembourg Luxembourg	27. I. 1977	11. 9. 1981	12. 12. 1981			
Malte Malta						
Pays-Bas Netherlands	27. I. 1977	18. 4. 1985	19. 7. 1985	X ✓	X ✓	
Norvège Norway	27. I. 1977	10. 1. 1980	11. 4. 1980	X ✓		
Portugal Portugal	27. I. 1977	14. 12. 1981	15. 3. 1982	X ✓		
Espagne Spain	27. 4. 1978	20. 5. 1980	21. 8. 1980			
Suède Sweden	27. I. 1977	15. 9. 1977	4. 8. 1978	X ✓		
Suisse Switzerland	27. I. 1977	19. 5. 1981	20. 8. 1981	X ✓		
Turquie Turkey	27. I. 1977	19. 5. 1981	20. 8. 1981			
Royaume-Uni United Kingdom	27. I. 1977	24. 7. 1978	25. 10. 1978		X ✓	
Etats non membres Non member States						

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

JUR/Tr. N° 90
Decl./Res. Cyprus
Or. Engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

Reservations and Declarations

CYPRUS

(Extract from the Procès-verbal of deposit of the instrument of ratification - 26 February 1979)

When depositing this instrument of ratification, the Permanent Representative declares that the Republic of Cyprus makes the following Reservation in accordance with Article 13.1 of this Convention :

"The Government of the Republic of Cyprus reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence."

and the following Notifications :

- "(a) With respect to Article 7 of the Convention and pursuant to the Republic of Cyprus *the Extension of Jurisdiction of National Courts with respect to certain Terrorist Offences Law of 1979* which has been enacted by the House of Representatives of the Republic of Cyprus on the 18th January 1979, the national courts of Cyprus can prosecute a person suspected to have committed an offence mentioned in Article 1 of this Convention.
- (b) In this regard, the Government of the Republic of Cyprus wishes further to notify that its reservations and declarations made on 22nd January 1971 when depositing its Instrument of Ratification with regard to the European Convention on Extradition of 13th December 1957 are still valid."

CONSEIL DE L'EUROPE COUNCIL OF EUROPE

JUR/Tr. N° 90
Decl./Res. Denmark/Danemark
Or.fr.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME

signée à Strasbourg, le 27 janvier 1977

Reservations and Declarations Réserves et Déclarations

DENMARK

(Extract from the Procès-verbal of deposit of the instrument of ratification - 27 June 1978)

1. Provisionally, the Convention does not apply to the Faroe Islands and Greenland.
2. The Danish Government, in accordance with the provisions of Article 13 of this Convention and subject to the undertaking contained in that article, reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence.

DANEMARK

(Extrait du Procès-verbal de dépôt de l'instrument de ratification - 27 juin 1978)

1. A titre provisoire, la Convention ne s'applique pas aux Iles Féroé et au Groenland.
2. Le Gouvernement danois, en conformité avec les dispositions de l'article 13 de cette Convention et tenant compte de l'engagement contenu dans cet article, se réserve le droit de refuser l'extradition en ce qui concerne toute infraction énumérée dans l'article 1 qu'il considère comme une infraction politique.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

AS THIS DOCUMENT WILL NOT BE
DISTRIBUTED DURING THE MEETING
PLEASE BRING THIS COPY

JUR/Tr. N° 90
Decl./Res. France
Or.fr.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

Reservations and Declarations

FRANCE

(Declaration made at the time of signature - 27 January 1977)

Translation

In deciding to sign the European Convention on the Suppression of Terrorism today the government wished to demonstrate its solidarity with the other European countries in combatting a danger which has caused - and still causes - a number of innocent victims and very properly arouses public feeling.

This signature is the logical consequence of the action we have been taking for several years and which has caused us on several occasions to strengthen our internal legislation and to ratify The Hague and Montreal Conventions on air terrorism.

It is self-evident that efficiency in this struggle must be reconciled with respect for the fundamental principles of our criminal law and of our Constitution, which states in its Preamble that "Anyone persecuted on account of his action for the cause of liberty has the right to asylum on the territory of the Republic".

It is also clear that such a high a degree of solidarity as is provided for in the Council of Europe Convention can only apply between States sharing the same ideals of freedom and democracy.

France will therefore subject the application of the Convention to certain conditions. On ratification it will make the reservations necessary to ensure that the considerations I have just mentioned will be taken into account and that human rights will at no time be endangered.

There is a further point of very special importance to the government : this is the success of the work of the Nine in the same field following the decisions of the European Council on 13 July 1976. We wish to avoid risks of conflict between the two texts and the government therefore does not intend to ratify the Strasbourg Convention before the instrument which will be prepared by the Nine.

Furthermore, taking action against terrorism does not absolve us from tackling the political problem of the causes of terrorism. For in many respects the real struggle against terrorism is a struggle for a just peace which guarantees everyone's legitimate rights.



CONSEIL DE L'EUROPE COUNCIL OF EUROPE

JUR/Tr. N° 90
Decl./Res. Germany/Allemagne
Or. germ. fr.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME

signée à Strasbourg, le 27 janvier 1977

Reservations and Declarations Réserves et Déclarations

FEDERAL REPUBLIC OF GERMANY

(Extract from the Procès-verbal of deposit of the instrument of ratification -
3 May 1978)

With effect from the date on which the said Convention enters into force for the Federal Republic of Germany, it shall also apply to Land Berlin, subject to the rights, responsibilities and legislation of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

In particular, nationals of the French Republic, the United Kingdom of Great Britain and Northern Ireland or the United States of America shall not be extradited without the consent of the appropriate Sector Commandant.

REPUBLIQUE FEDERALE D'ALLEMAGNE

(Extrait du Procès-verbal de dépôt de l'instrument de ratification - 3 mai 1978)

Avec effet de la date à laquelle la Convention entrera en vigueur pour la République Fédérale d'Allemagne, elle s'appliquera également au Land de Berlin, sous réserve des droits, responsabilités et législations de la République française, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et des Etats-Unis d'Amérique.

En particulier, des ressortissants de la République française, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord ou des Etats-Unis d'Amérique ne devront pas être extradés sans l'assentiment du Commandant de secteur compétent.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

JUR/Tr. No. 90
Res. Iceland/Islande
or. Engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM
Signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME
Signée à Strasbourg, le 27 janvier 1977

Reservations and Declarations
Réerves et Déclarations

ICELAND

(Extract from the instrument of ratification deposited on 11 July 1980)

The Government of Iceland, in accordance with the provisions of Article 13 of the Convention and subject to the undertaking contained in that article, reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives.

ISLANDE

(Extrait de l'instrument de ratification déposé le 11 juillet 1980)

Le Gouvernement d'Islande, en conformité avec les dispositions de l'article 13 de la Convention et tenant compte de l'engagement contenu dans cet article, se réserve le droit de refuser l'extradition en ce qui concerne toute infraction énumérée dans l'article 1er qu'il considère comme une infraction politique, comme une infraction connexe à une infraction politique ou comme une infraction inspirée par des mobiles politiques..

COUNCIL OF EUROPE —————

CONSEIL DE L'EUROPE

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JUR/Tr. N° 90
Decl./Res. Italy
Or.fr.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

Declarations and Reservations

ITALY

(Declaration made at the time of signature - 27 January 1977)

Translation

Italy declares that it reserves the right to refuse extradition and mutual assistance in criminal matters in respect to any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives : in this case Italy undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including :

- a. that it created a collective danger to the life, physical integrity or liberty of persons ; or,
- or,
- b. that it affected persons foreign to the motives behind it ;
- c. that cruel or vicious means have been used in the commission of the offence.

COUNCIL OF EUROPE ————— ————— CONSEIL DE L'EUROPE

JUR/Tr. N° 90
 Decl. Res./Netherlands
 Or. Engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

Signed at Strasbourg, on 27 January 1977

Reservations and Declarations

NETHERLANDS

3

(Reservation and Declaration contained in the instrument of acceptance, deposited on 18 April 1985).

1. "The Kingdom of the Netherlands accepts the Convention for the Kingdom in Europe."
2. "With due observance of Article 13, paragraph 1, of the Convention, the Kingdom of the Netherlands reserves the right to refuse extradition in respect of any offence mentioned in Article 1 of the Convention including the attempt to commit or participation in one of these offences, which it considers to be a political offence or an offence connected with a political offence."

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

JUR/Tr. N° 90
 Rés. Norway/Norvège
 or. Engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME

signée à Strasbourg, le 27 janvier 1977

----- Reservations and Declarations Réserves et Déclarations

NORWAY

(Extract from the instrument of ratification deposited on 10 January 1980)

.... Norway declares that it reserves the right to refuse extradition and mutual assistance in criminal matters in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives. In this case Norway undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence including :

- a) that it created a collective danger to the life, physical integrity or liberty of persons ; or
- b) that it affected persons foreign to the motives behind it ; or
- c) that cruel or vicious means have been used in the commission of the offence.

NORVEGE

(Extrait de l'instrument de ratification déposé le 10 janvier 1980)

Traduction

....La Norvège déclare qu'elle se réserve le droit de refuser l'extradition et l'entraide judiciaire en matière pénale en ce qui concerne toute infraction énumérée dans l'article 1er qu'elle considère comme une infraction politique, comme une infraction connexe à une infraction politique ou comme une infraction inspirée par des mobiles politiques. Dans ce cas, la Norvège s'engage à prendre dûment en considération, lors de l'évaluation du caractère de l'infraction, son caractère de particulière gravité, y compris :

- a) qu'elle a créé un danger collectif pour la vie, l'intégrité corporelle ou la liberté des personnes ; ou bien
- b) qu'elle a atteint des personnes étrangères aux mobiles qui l'ont inspirée ; ou bien
- c) que des moyens cruels ou perfides ont été utilisés pour sa réalisation.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

JUR/Tr. N° 90
Res. Portugal
or. port.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM
Signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME
Signée à Strasbourg, le 27 janvier 1977

Declarations and Reservations
Déclarations et Réserves

PORTUGAL

(Extract from the instrument of ratification deposited on 14 December 1981)

Translation

... As requested State, Portugal shall not grant extradition for offences punishable in the requesting State with either the death penalty, life imprisonment or a detention order involving deprivation of liberty for life.

PORTUGAL

(Extrait de l'instrument de ratification déposé le 14 décembre 1981)

Traduction

... En tant qu'Etat requis, le Portugal n'accordera pas l'extradition lorsque les infractions sont punies dans l'Etat requérant, soit de la peine de mort, soit d'une peine ou d'une mesure de sécurité privatives de liberté à perpétuité.

CONSEIL DE L'EUROPE COUNCIL OF EUROPE

JUR/TR. N° 90
Decl./Res. Sweden/Suède
Or. engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME

signée à Strasbourg, le 27 janvier 1977

Reservations and Declarations Réerves et Déclarations

SWEDEN

(Extract from the Procès-verbal of deposit of the instrument of ratification -
15 September 1977)

The Swedish Government, in accordance with the provisions of Article 13 of this Convention and subject to the undertaking contained in that article, reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence.

SUEDE

(Extrait du Procès-verbal de dépôt de l'instrument de ratification -
15 septembre 1977)

Traduction

Le Gouvernement suédois, en conformité avec les dispositions de l'article 13 de cette Convention et tenant compte de l'engagement contenu dans cet article, se réserve le droit de refuser l'extradition en ce qui concerne toute infraction énumérée dans l'article 1 qu'il considère comme une infraction politique.

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

JUR/Tr. No. 90
Res./Switzerland
or. fr.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

Signed at Strasbourg, on 27 January 1977

Declarations and Reservations

SWITZERLAND

9

(Reservation contained in the instrument of ratification deposited on 19 May 1983)

Switzerland reserves the right to refuse extradition in respect of any offence mentioned in Article 1, which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives ; in these cases, Switzerland provides that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including :

- a. That it created a collective danger to the life, physical integrity or liberty of persons, or
- b. That it affected persons foreign to the motives behind it, or
- c. That cruel or vicious means have been used in the commission of the offence

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

JUR/Tr. N° 90
 Decl./Res. United Kingdom/
 Royaume-Uni
 or. Engl.

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM
 signed at Strasbourg, on 27 January 1977

CONVENTION EUROPEENNE POUR LA REPRESSION DU TERRORISME
 signée à Strasbourg, le 27 janvier 1977

Reservations and Declarations
 Réserves et Déclarations

UNITED KINGDOM

(Extract from the instrument of ratification deposited on 24 July 1978)

....The Government of the United Kingdom of Great Britain and Northern Ireland, having considered the Convention aforesaid, hereby confirm and ratify the same in respect of the United Kingdom of Great Britain and Northern Ireland, the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man, and undertake faithfully to perform and carry out all the stipulations therein contained.

ROYAUME-UNI

(Extrait de l'instrument de ratification déposé le 24 juillet 1978)

....Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, ayant examiné la Convention précitée, la confirme et la ratifie à l'égard du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, du Bailliage de Jersey, du Bailliage de Guernesey et de l'Ile de Man, et s'engage à remplir et exécuter fidèlement les obligations stipulées dans ladite Convention.

APPENDICES TO THE STATEMENT OF
PROFESSOR KEARA O'DEMPSEY

- Appendix A(1) -- Partial List of Early U.S. Senators
Potentially Extraditable Under Terms
Of Supplementary Treaty
- Appendix A(2) -- Editorial, London Sunday Times, August 16,
1981
- Appendix B --
1. Excerpts from Shoot to Kill?--International Lawyers' Inquiry (Dublin 1985).
 2. Excerpts from The Prevention of Terrorism Act: The Case for Repeal (London 1983).
 3. Excerpts from Supergrasses: The Use of Accomplice Testimony in Northern Ireland (London 1984).
 4. Excerpts from The Use and Abuse of Emergency Legislation in Northern Ireland (London 1983).

APPENDIX A(1)

<u>Senator</u>	<u>Cong.</u>	<u>State</u>	<u>Potentially Extraditable Acts</u>
William Few	1st	Conn.	Lt. Col., Richmond Co. Militia, 1779.
James Gunn	1st	Ga.	Served in Revolutionary War; participated in relief of Savannah, 1782.
John Langdon	1st	N.H.	Participated in Battle of Bennington; commanded a Company at Saratoga and in R.I.
Rufus King	1st	N.Y.	Served in Revolutionary War; aid to Gen. Sullivan in R.I. expedition.
Philip J. Schuyler	1st	N.Y.	One of four Maj. Generals of Continental Army.
Benjamin Hawkins	1st	N.C.	Member of Gen. Washington's staff (interpreter).
William Maclay	1st	Pa.	Served Continental Army as commissary.
Joseph Stanton, Jr.	1st	R.I.	Colonel in Revolutionary Army.
Ralph Izard	1st	S.C.	Pledged his large estate for payment of warships of Revolutionary Army.
William Grayson	1st	Va.	Aide to Gen. Washington; colonel of Va. regiment; distinguished service at Battle of Monmouth, 1778.

* This table is a partial listing of Senators likely to have been extraditable under a treaty such as the supplementary treaty. The information presented here is taken from the Biographical Directory of the American Congress: 1774-1961 (Government Printing Office 1961).

John Walker	1st	Va.	Colonel in Revolutionary Army and special aide to Gen. Washington; received commendation for confidential service.
James Monroe	1st	Va.	Lieut. of 3rd Va. Regiment, Continental Army; numerous engagements; wounded in Battle of Harlem Heights.
Richard Henry Lee	1st	Va.	Colonel of Westmoreland Militia; took part in engagement against British at Stratford Landing, 1781.
John Brown	2nd	Ky.	Enlisted in and served till end of Revolutionary War.
Aaron Burr	2nd	N.Y.	Distinguished service at Monmouth and New Haven.
Moses Robinson	2nd	Vt.	Head of regiment on Mt. Independence, 1777.
Stephen Bradley	2nd	Vt.	Capt. of volunteer co.; aide to Gen. Wooster.
John Taylor	2nd	Va.	Col. during Rev. War.
James Jackson	2nd	Ga.	Revolutionary Army; Commander of Ga. co., 1781.
Frederick Frelinghuysen	3rd	N.J.	Served Rev. War; Col., Somerset Co. Militia.
Alexander Martin	3rd	N.C.	Lt. Col.; served at Battles of Brandywine and Germantown.
Albert Gallatin	3rd	Pa.	Served in Rev. Army.
Stevens Mason	3rd	Va.	Rev. Army; aide to Gen. Washington at Yorktown.
Josiah Tattnall	4th	Ga.	Served under General Anthony Wayne.
Humphrey Marshall	4th	Ky.	Cavalry captain.

London Sunday Times

Aug. 16, 1981

p. 12, col. 1

THE SUNDAY TIMES

Ireland: the change that has to come

BRITISH POLICY in Northern Ireland—to try to keep it in the United Kingdom by general consent—has not worked, is not working and will not work. Even among those who wish it would work, and knew the attempt to have been honourable, that sad fact is more recognised every day. The signs multiply. Protestants, the local majority, are as a group as little interested as ever in offering a share in power to Roman Catholics; it would now not be accepted anyway—the minority's once-constitutional party (the SDLP) has again decided not to oppose the terrorist cause in an important by-election; terrorist violence itself persists; and the wretched hunger-strike in its support grinds on, defying all predictions of collapse.

Britain has been right to resist that strike, a demand for political recognition of men convicted of engaging or assisting in random murder. Yet it is vital to make the distinction between method and aim. The methods of the Provisional IRA are hateful, and no humane government ought to countenance them. Its basic aim, on the other hand, is shared by a majority of people on the island of Ireland, and respected by great numbers in the world beyond: a New York judge's decision that an alleged Provisional attempt to kill a British soldier was non-extraditable because political is only the latest indication. That aim is for an end to British rule over those six counties of the island of Ireland where it still survives.

The essential point can be simply put. It is that the rival nationalisms of the two Northern Irish factions are both negative. There is nothing odd or discreditable about that: most British voters cast their votes against, rather than for, a particular party or proposal. Catholics (in broad terms) want an end to British rule. Protestants cannot abide the idea of Irish rule. Those are the root impulses, and in a country of long memories they will not change. Current British policy fails because it flouts the first impulse. A solution must acknowledge both.

There is only one such solution to be had, though in detail it can take many forms. It is that Britain should declare its intention of renouncing its sovereignty over Northern Ireland, yet not in favour of a united Ireland. The first part accommodates Catholic wishes, the second Protestant. The one remaining recourse is that Northern Ireland should become an independent state. Its independence would be even more circumscribed than most small countries' is by subsidies, and defence treaties, and human-rights conventions. But the cause of offence would have been removed without a fresh one being substituted.

Certainly there are objections, as there are to plans for any change or none. The first is that the Protestants do not want to be thus put out of the United Kingdom, and have indeed been promised that they need not be. It could be counter-argued that the local majority they represent is a 1921 gerrymander, and carries little authority; and

that during the past 12 years they have made small return for the guarantee in the shape of concessions to Catholics. But those arguments are not needed. The true meaning of the guarantee was that Protestants would not be submitted to rule by the Catholic Republic to the South. Under this plan, they would not be. Relations between an independent North and its neighbours would be for its own citizens to decide. Individually, moreover, Protestants would have the option of British as well as Northern Irish citizenship—just as Irish Republic citizenship is already available to the other side.

A second objection is that Protestants might misuse their continuing majority (since Northern Ireland exists, gerrymandered or not, and there could be no question of enlarging its six counties into the nine of the old province of Ulster, where numbers might be roughly level). Here protection lies partly in the common sense of a hardheaded people, who with the threat of Dublin rule removed might be expected to see the unwisdom of living at enmity with so large a minority in their midst. Besides that, though, there would be legal safeguards. Mr Callaghan, the most recent advocate of the independence idea, has suggested a Bill of Rights-backed by judges from Britain, the Republic and Northern Ireland itself.

A third objection is contained in the word "bloodbath"—that the withdrawal of British order would be the signal for unconfined private feuding. The theory ignores the increased authority of the Royal Ulster Constabulary, and the fact that the luckless British army now provokes by its mere presence part of the bloodletting it came to stop. There is also the possibility that to do nothing now would occasion fiercer bloodshed later. From India to Rhodesia, Britain has withdrawn from many involvements across the sea; and the process has been followed sometimes by fearful slaughter, and sometimes by flat calm. There is a risk; but it is a risk, given the present impasse, which has to be taken sooner or later.

Most of those withdrawals were carried out to a time-table. That would become desirable, but not at once. The first step after the British declaration would be discussions among Northern Ireland's own representatives, elected for the purpose, and with ministers of the London and Dublin governments in attendance, since much would be needed from both. If Provisionals could get themselves elected, well and good: if not, they would have no part in the new dispensation, and deserve none. Their hunger-strike would fall back into proportion. Britain's concession would not after all be to them: it would be to the people of Northern Ireland as a whole—Protestant as well as Catholic, since there is no other way whereby Protestants can enjoy their homes in peace. And it would be a concession to the logic which Britain has reluctantly acknowledged in many other parts of the world, and cannot much longer evade in this most difficult instance.

APPENDIX B*

TABLE OF CONTENTS

	<u>page</u>
1. Excerpts from Asmal, K., Chmn., <u>Shoot to Kill? -- International Lawyers' Inquiry</u> (Dublin: Mercier 1985)	1B
2. Excerpts from Scorer, C. and P. Hewitt, <u>The Prevention of Terrorism Act: The Case for Repeal</u> (London: National Council of Civil Liberties 1983)	30B
3. Excerpts from Gifford, Lord T., <u>Supergrasses: The Use of Accomplice Evidence in Northern Ireland</u> (London: The Cobden Trust 1984)	54B
4. Excerpts from Walsh, D.P.J., <u>The Use and Abuse of Emergency Legislation in Northern Ireland</u> (London: The Cobden Trust 1983)	60B

*This Appendix is composed of excerpts from the above-named reports, which have been edited so as to present the most significant facts and findings. In one or two cases, the material has been reordered slightly to preserve comprehensibility. Copies of the complete originals will be provided upon request of any Committee member.

1. Excerpts from Shoot to Kill?--International Lawyers' Inquiry (1985)--

Origins of the Present Conflict:

Partition and the Special Powers Act

9. The British Government partitioned Ireland in 1920. The Government of Ireland Act, passed that year by the Westminster Parliament, divided the traditional nine counties of 'Ulster', taking the six north-eastern counties and creating 'Northern Ireland'. The remaining three were integrated into the 26-county Irish Republic, or 'Irish Free State' as it was then known.

10. A civil war was fought in the Free State in which the Irish Republican Army (I.R.A.) sought to overthrow the Free State government which had signed the treaty of partition with Britain. When the I.R.A. laid down their arms the government disarmed the police force and the Irish Republic's police have remained essentially an unarmed force to this day. However, the Royal Ulster Constabulary (R.U.C.) in the North retained arms and armoured cars. The R.U.C. were assisted by a part-time special constabulary, 'the Specials', a paramilitary reserve which was eventually disbanded in 1970.

11. Northern Ireland has always been subject to emergency legislation. Among the first laws passed by the newly formed Unionist parliament was the Civil Authorities (Special Powers) Act of 1922. The Act had to be, and was, renewed annually until 1928, when it was extended for five years. In 1933 it was made permanent, remaining in force until the British Government assumed direct control of Northern Ireland in 1972.

12. Leading academic authorities on Northern Ireland's emergency powers have written:

The powers of arrest and detention under the Special Powers Act, as it was generally known, were not formally directed against Roman Catholics and Republicans, but it was common knowledge that it was against them and them alone that it was directed and used. On each occasion that Republican militants, whether from north or south of the border, resumed their active campaign for the re-unification of Ireland by force, as in 1938 and 1956, substantial numbers of leading Republican politicians and activists were interned without trial. In this way the Unionists made use of the legal system to secure themselves both against peaceful political challenge and against internal and external terrorist attacks.¹

13. The Act was not restricted to indefinite detention without trial; it also imposed the death penalty for some firearms and explosive offences which were not capital crimes in Britain. It permitted flogging, arrest without warrant and the prohibition of Coroner's Inquests in the interests of 'preserving peace and maintaining order' (see para. 165). In case any loophole might be found, the Unionist Government had a catch-all provision in Article 2(4):

If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations.

14. The Act remained in force throughout the Unionist Party's 60 year rule of Northern Ireland. Its operation caused Britain's National Council for Civil Liberties to compare the Unionist Party's political machine in 1936 with the fascist dictatorships then ruling in Spain, Germany and Italy.⁴

Immediate Causes of the Current Conflict:

The Civil Rights Movement

15. During the 1960's, organised peaceful opposition to the Special Powers Act and to other forms of sectarian discrimination started to develop. Drawing on the example of civil rights workers in the United States, activists in Northern Ireland held marches and demonstrations to demand equal voting rights, freedom from job discrimination and equal access to government-built housing. Abolishing the Special Powers Act became a major priority since the Act was constantly invoked to ban marches, outlaw organisations and generally to give the R.U.C. and the 'Specials' a free hand in dealing with protestors.

16. In 1968 and 1969, television viewers in Britain, Ireland and further afield were shocked by newsfootage of security forces batoning peaceful demonstrators and using water cannons against them. Boyle, Hadden and Hillyard describe the events of 1969 as follows:

The ensuing riotous confrontations in Londonderry in January and April were followed by two night-time 'invasions' of the Roman Catholic Bogside area by large numbers of uniformed R.U.C. officers in the course of which substantial damage and injury to residents was inflicted. Final confirmation for the minority community of the unity of purpose between the R.U.C., the B Specials and the Protestant militants was given by the events of August 1969 in Londonderry, Armagh, Coalisland, Dungannon, Dungiven and Belfast, which events⁵ led to the deployment of British troops.⁵

26. Having accounted for two civilian deaths in November of 1969, the British Army was responsible for the deaths of five unarmed civilians in 1970. All were shot in Belfast in July, during a 'curfew' imposed on the Nationalist community.

27. In 1971, however, the toll rose to 33 civilians shot dead by the British Army and, of these, 28 were shot in the period August to December. This period coincided with the re-introduction of internment without trial under the Special Powers Act.

28. Within weeks of the re-introduction of internment, reliable reports were received that internees had been subject to gross physical abuse. This led the Irish Government to file a complaint with the European Commission of Human Rights at Strasbourg in December 1971, alleging torture in interrogations. Ultimately, the European Court of Human Rights ruled in 1978 that this treatment was 'inhuman and degrading' and a violation of Article 3 of the European Convention of Human Rights.

Internment was used exclusively against the Nationalist community to start with and that community responded with widespread rioting. Peaceful anti-internment demonstrations were held, but increasingly these met with bans under the Special Powers Act. Finally, on 30 January 1972, the British Army's Parachute Regiment effectively put an end to all peaceful protest by killing 13 unarmed demonstrators in Derry.

British Government Commissions Find that
Northern Irish Police Have Attacked
Nationalist/Catholics:

30. In 1969 Lord Hunt's 'Report of the Advisory Committee on Police in Northern Ireland' reported on the role of the 'B Specials' in leading attacks on Catholic/Nationalist communities:

... while there is no law or official rule that precludes any person, whatever his religion, from joining the Ulster Special Constabulary, the fact remains that, for a variety of reasons, no Roman Catholic is a member.¹⁷

Lord Hunt found further that only 11% of the R.U.C. as a whole were Catholic. He recommended that the 'Specials' be disbanded immediately and the R.U.C. be disarmed. He proposed a re-organisation of the R.U.C. along the lines of a traditional British county police force.

31. The British government accepted Lord Hunt's first recommendation and the 'Specials' were disbanded. However, the R.U.C. retained their firearms and no major re-organisation occurred. At the same time the Ulster Defence Regiment (U.D.R.) was created, with the same numerical strength of the 'Specials' and with many former 'Specials' enlisting.

32. The Hunt Report was followed by the Cameron Report on 'Disturbances in Northern Ireland Between October 1968 and March 1969'.¹⁸ Lord Cameron, a senior Scottish judge, made further serious criticisms of the R.U.C. and 'Specials' for their actions in promoting civil unrest.

33. The Scarman Report on 'Violence and Civil Disturbances in Northern Ireland in 1969'¹⁹ was not published until after the abolition of the Northern Ireland Parliament in March 1972. Lord Justice Scarman found that a number of killings by the security forces had been unjustified, including that of John Gallagher in Armagh (see para. 17 above). Despite his findings, no prosecution was brought against any member of the security forces.

34. The Widgery Report on 'the Events on Sunday 30th January 1972 which led to Loss of Life in Connection with the Procession in Londonderry on that Day'²⁰ has itself been the subject of further inquiries and critical reports. Lord Chief Justice Widgery criticised some of the shootings on 'Bloody Sunday' as 'reckless'. Although this would be enough to justify a charge of murder or, at the least, manslaughter, no prosecutions followed. For the most part, the Widgery Report exonerated the Parachute Regiment, although no evidence was received which supported the claim that the Army came under fire. Lord Widgery's conclusions were widely questioned in Northern Ireland and abroad.²¹

36. Since 1972 there has been no government inquiry into the killing of civilians by members of the security forces. Recently, a number of leading figures in the Catholic Church and the Nationalist community have called on the Government to institute such a public inquiry, but to no avail. The refusal of the Government to appoint its own inquiry is one of the factors which have led us to undertake our Inquiry and to present a summary of the evidence received and our findings and recommendations which follow.

The Security Forces* Have Killed 155 Unarmed Civilians in Northern Ireland:

Evidence received by the Inquiry of Civilians killed by the Security Forces

17. On 14 August 1969, the B Specials opened fire on a crowd dispersing peaceably following a civil rights rally in Armagh. John Gallagher was shot dead. On the same day, the British Army made its first appearance on the streets of Northern Ireland in recent years. They were sent to Derry, where the B Specials were leading a siege of the Nationalist Bogside area.

18. The Irish Information Partnership, an independent, non-profit research group based in Belgium, provided the Inquiry with extensive data on the killings of civilians by members of the security forces.⁶ Their evidence shows that before the end of 1969 at least six more civilians were shot dead by members of the R.U.C. and that at least 269 persons were killed by members of the security forces on duty in Northern Ireland between August 1969 and January 1984.⁷

19. The Irish Information Partnership testified that over 155 people shot dead in this period by British soldiers and the Royal Ulster Constabulary had no manifest connection to paramilitary organisations or activities.

39. By February 1984 when we held our Inquiry, according to evidence submitted by Mr Steven C. Greer, Cobden Trust Research Student at The Queen's University of Belfast, a total of 14 prosecutions had been brought against members of the security forces for using their firearms while on duty to kill unarmed civilians.²⁴ Of these prosecutions, 8 were against regular British Army soldiers, 2 against members of the Ulster Defence Regiment and 4 against R.U.C. officers. (There remains some question whether one of the U.D.R. members was on duty at the time).

40. Only one conviction was recorded prior to February 1984, that of Private Robert Reid Davidson for the manslaughter of a woman passenger in a car which passed through a checkpoint at Strabane on 12 April 1980. Private Davidson was sentenced to 12 months in a Young Offenders' Centre and his sentence was suspended for two years.

* "Security Forces" refers to the British Army in Northern Ireland, the Royal Ulster Constabulary and the Ulster Defense Regiment.

Sampling of Case Histories in Which British Forces Have Killed Catholics with Total Impunity:

67. Danny Barrett

Date & Place: 9 July 1981. Ardoyne, Belfast.

Undisputed Facts: Danny Barrett, aged 15, was shot dead by a British Army sniper at about 9.30 pm as he sat on his front garden wall. He was unarmed. Neither Danny Barrett nor any member of his family had ever been involved in any paramilitary organisation. On the preceding day an I.R.A. prisoner, Joe McDonnell, had died on hunger strike and rioting occurred in the Ardoyne and other areas of Belfast. Danny took no part but sat on the wall with a friend, talking to his father who stood in the doorway to their home.

Approximately 75 yards east of the Barrett home some shots were fired at an R.U.C. landrover. A soldier stationed at an army observation post in the Flax Street Mill, some 260 yards south of where Danny Barrett was sitting, looked through the magnifying sights on his rifle and shot and killed Danny Barrett.

Information: We were supplied with the findings of the Coroner's jury and statements and other documents available at the inquest. Father Faul and Father Murray, in their booklet: *Danny Barrett: A British Army Murder*, described an Army search of the Barrett home immediately after the shooting, writing that an officer in charge of the search had to order his men to stop looking through children's schoolbooks and to search for a gun. No gun was found.

Danny died almost instantly, so no surgery could have saved him. However, we were told that, on the way to the Mater Hospital, the ambulance carrying him was stopped by the British Army and the occupants were questioned for about three minutes. The ambulance then continued for a further 50 yards or so before being stopped again by the Army. Despite the ambulance crew's protests, a further three minutes were spent in questioning. 150 yards further on, the ambulance was stopped by the R.U.C. who, after a further series of questions, finally escorted them to the hospital.

The Inquiry heard from volunteer ambulance driver Gerard McGivern that the practice of stopping ambulances on emergency missions is 'quite usual' in some areas and he described it as 'absolutely unacceptable'.

Official Action: The Director of Public Prosecutions announced that 'Soldier A' would not be prosecuted. No reason was given for the decision and we were unable to discover any official explanation by the Army or the D.P.P. for the soldier's action.

69. *Maura Meehan and Dorothy McGuire*

Date & Place: 23 October 1971. West Belfast.

Undisputed Facts: Both were shot dead by the British Army as they were travelling in a car through the streets of West Belfast. The car was sounding its horn to warn of the presence of British troops in the area.

Information: The Inquiry heard evidence from Mrs Margaret Murray, Mrs Meehan's sister-in-law, who stated that after the shootings, the Army put out three successive statements claiming first, that the two were dressed as terrorists and had thrown two nail bombs from the car; secondly, that one nail bomb had been thrown; finally, that the army had been fired on from the car. At the Inquest a forensic expert stated that there were no traces of guns or bombs having been in the car. Neither woman was wearing what could possibly be described as paramilitary clothing.

Official Action: There were no prosecutions.

Current Status: After 12 years, Mrs Meehan's widower received a settlement of his claim against the British Army. The amount received was £1,200.

55. Eugene Toman, Gervaise McKerr and Sean Burns

Date & Place: 11 November 1982. Lurgan, County Armagh.

Undisputed Facts: Gervaise McKerr was driving his car with Toman as the front seat passenger and Burns in the back. An R.U.C. patrol opened fire on the car, killing all of the occupants. Eugene Toman was half out of the passenger door when he was killed. All three men were unarmed.

Official Action: Following the statement of the Armagh Coroner, (See above, para. 54) the D.P.P. announced, almost a year after the killings, that three R.U.C. officers had been charged with the murder of Eugene Toman. There was no charge in relation to either McKerr or Burns, because the prosecution claimed that, since Toman was found half out of the car, he must still have been alive when the car stopped and he was killed as he tried to crawl out of it.

The trial of Sergeant William Montgomery, Constable David Brannigan and Constable Frederick Robinson took place in a Diplock Court before Lord Justice Gibson in June 1984. At the close of the prosecution case the judge announced that he intended to acquit all three men. He then adjourned the case until the following day when he gave detailed reasons for his decision:

I wish to make it clear [Judge Gibson said] that having heard the Crown case I regard each of the accused as absolutely blameless in this matter. That finding should be put in their record along with my own commendation for their courage and determination in bringing the three deceased men to justice, in this case, the final court of justice.

Those who brought the prosecution on such evidence [the judge continued] undoubtedly did not take into account that these men's personal security was at risk. . .

The case is going to have a more widespread effect among other members of the security forces generally. When a policeman or soldier is ordered to arrest a dangerous criminal and on the basis of that order to bring him back dead or alive, how is he to consider his conduct now?" (Emphasis added).

Evidence: In the course of the trial Mr Michael McAtamney a senior Deputy Chief Constable in the R.U.C. gave evidence that the three accused, like P.C. Robinson in the Grew case, were all members of the undercover 'E4A' surveillance unit, trained by the S.A.S. in 'firepower, speed and aggression'. The *Irish News* reported that Mr McAtamney told Judge Gibson that the officers' training was based on the premise:

Once you have decided to fire, you shoot to take out your enemy. 'Do you mean, permanently out of action?' asked the judge. 'Yes,' replied Mr McAtamney."

According to the evidence, the E4A unit had been tailing the three deceased men for three days.

Although evidence was given that two of the three men were wanted for multiple murder, no explanation was given why the R.U.C. continued to tail the men for three days instead of arresting them.

Following the acquittals, Lord Justice Gibson's remarks were condemned by the Irish Government, elected representatives of the Nationalist community in the North and lawyers in Northern Ireland and Britain. However, he also received praise from Unionist politicians.

The calls for Lord Justice Gibson's resignation and the controversy about the case continue. In its leading editorial on 11 June 1984, the *Irish Times* wrote:

Mr Peter Barry [The Irish Foreign Minister] was right to protest to the British Ambassador about the extraordinary remarks of Lord Justice Gibson when he acquitted the R.U.C. men accused in the Armagh 'shoot-to-kill' case. He had a right, too, to demand action to make it clear that a 'shoot-to-kill' policy is not being pursued; and he certainly had every right to vindicate the prerogative of the Irish Government to speak up for the harassed nationalist community in Northern Ireland.

Dublin's 'legitimate interest' in Northern affairs has been accepted by several British Governments, including the present. Dublin is a partner – one of the chief partners – in the search for a political settlement. And Dublin has an intense interest in the kind of security policies (to dignify them by that word) pursued in the North.

The editorial concluded by calling on Mr James Prior, Secretary of State for Northern Ireland, to prove his concern by:

... reforming the system of justice in Northern Ireland, abandoning the 'shoot-to-kill' tactic and disbanding what in Latin America would be called 'death squads'.¹³

133. We are satisfied that there is no authority in the wording of Section 3 (1) of the Criminal Law Act (Northern Ireland) 1967 to justify any judge in using such expressions as 'the final court of justice' and 'bring him back dead or alive'. These unprecedented statements, made by Northern Ireland's second most senior judge, are without parallel. Both domestic and international law emphatically prohibit such an approach.

The Killings of Seamus Grew and Roddy Carroll

126. R.U.C. Constable John Robinson was charged with the murder of Grew and tried in April 1984 by Mr Justice MacDermott. The details of these killings are set out at para. 54 above but here we are concerned with the reasons Robinson gave for killing the two unarmed men and the reasons MacDermott J. gave for acquitting Robinson.

127. Constable Robinson testified that he was a member of 'E4A', an undercover unit trained by the Special Air Service (S.A.S.) regiment of the British Army. Chris Ryder, a journalist with the London *Sunday Times*, reported on Robinson's testimony as follows:

One feature of the training is that the traditional police concept of use of minimum force is abandoned. In one exercise, officers have to burst into what is known as the 'killing room' and fire a set number of shots into a dummy within a certain time. The exercise, aimed at developing 'firepower, speed and aggression', is repeated until the officer meets the standard.¹⁴

The existence of these undercover police units, trained to use maximum, rather than minimum force, has been confirmed by a senior R.U.C. Deputy Chief Constable (para. 55 above).

129. We find that the British Government, in training special units in tactics outlawed by international law, is encouraging violations of the European Convention and of domestic law. Such tactics are aimed at placing the security forces either above the law altogether or, at the least, subjecting them to criteria far less stringent than those applied to the civilian population.

130. None of this evidence might have emerged if Mr Justice MacDermott had granted Constable Robinson's motion to dismiss the charges at the end of the prosecution case. However, after his detailed testimony, according to Mary Holland, writing in the *New Statesman*:

In court the trial judge praised Constable Robinson for his sharp shooting.¹⁵

This statement, in conjunction with Robinson's acquittal, has been perceived as a serious departure from the even-handed application of the rule of law and is tantamount to the unleashing of the security forces from the legal constraints under which they must operate. In the light of his observations, many reasonable people must consider that the administration of justice would be best served if MacDermott J. were to recuse himself from any cases brought under emergency legislation as public confidence in the judiciary has been impaired by MacDermott J.'s utterances in this case.

45. We also heard from Father Raymond Murray who, since the killing of John Gallagher in Armagh in 1969, has kept detailed records of over 120 victims whom he described as:

completely innocent people, not shot dead in cross-fire or anything like that, but (whom) I would regard as deliberately shot dead in cold blood by British Army, U.D.R. and R.U.C.

Father Murray and Father Denis Faul, who have together written many studies on the killings by the security forces, provided us with a considerable volume of written evidence in support of their oral testimony (see Appendix B). Father Murray stressed the experience of priests working in Armagh:

Witnesses here would be very reluctant to go to the police station or co-operate with the police because of that general feeling in the community. The feeling is: 'what is the use, we will not get justice.'

He and other witnesses were particularly critical of the role of the U.D.R. since the 'Ulsterisation' policy of replacing regular British Army regiments with the Ulster Defence Regiment was introduced in many parts of Northern Ireland:

... Over the years, I'm sure Father Faul and I have made a thousand complaints and nothing ever comes of these complaints. There's no outlet, there's no opening for justice and this harassment and intimidation have increased in these last few years, especially because of the withdrawal of the other British regiments from the area. ...

... We have found that, with the 'Ulsterisation', harassment has increased a lot and we just couldn't do anything about this because complaints fell on deaf ears.

Father Murray called recent visits by the British Prime Minister, Margaret Thatcher, and the Duke of Edinburgh to the U.D.R. barracks in Armagh: 'very insensitive and an insult to the Catholic community here', in view of the number of murder charges recently brought against local members of the regiment.

46. Father Denis Faul described the British Army's Special Air Service Regiment (S.A.S.) as 'basically an assassination squad' and instanced the shootings at Coalisland of Brendan McGirr and Brian Campbell on 4 December 1983. Both young men had paramilitary connections and were surprised by S.A.S. soldiers at an arms cache. They were shot dead at a time when, according to Father Faul: 'the lives of the soldiers were not at risk', confirming what he called a commonly-held view that: 'the S.A.S. don't take prisoners'.

151. We were particularly disturbed to hear of four incidents in which the security forces had impeded access to emergency medical services:

Neil McMonagle – ambulance stopped by Army until R.U.C. arrived, despite the protests of a local priest, (Para. 59 above);

Danny Barrett – ambulance stopped and crew questioned three times by Army and R.U.C. on the short journey to hospital, (Para. 67);

Patrick Elliott – male nurse, Gerard McGivern, arrested for trying to give first aid, then ambulance turned away when the nurse said he believed Elliott was dead but that he was not medically qualified to certify death, (Para. 68);

Martin Malone – Brian McArdle was assaulted by a soldier striking him in the mouth as he went to telephone for a doctor, (Para. 50).

In the Martin Malone case the police did not visit the scene for several hours after his death and the U.D.R. patrol which shot him apparently left Malone lying dead at the scene without taking any further action (see Cardinal O Fiaich's statement at Malone's funeral, para. 50).

152. In at least three cases which we examined, the security forces used their extensive powers to search private homes without warrants a short time after the killings, when they visited or raided the homes of the deceased and failed to inform their families of the death: Liam Prince, (para. 51); Gervaise McKerr, (para. 55); and Patrick Elliott, (para. 67). In the further instance of Danny Barrett, (para. 67), shot as he sat on his family's front garden wall, the Army responded by searching the home in an oppressive fashion. We can only conclude that the purpose of these searches was to try to find some evidence *ex post facto* to justify the killing. Even accepting that as the motive, the cold inhumanity of refusing to inform families of these deaths is particularly disturbing.

A Sample of Additional Case Histories (taken from pp. 135-50 of original report):

NAME	SUMMARY	DATE	AGENT	CATEGORY	PLACE
Patrick Rooney	9 yrs, in bedroom in Divis Flats. RUC sprayed area with machine-gun mounted on armoured car. Scarman rept: firing 'not justified'.	14/9/69	RUC	Street disturbance	West Belfast
* George Dickie	Shot by BA on Shankill Rd after Hunt Report proposed disbanding B Specials.	11/11/69	BA	'Riot'	Shankill, North Belfast
Herbert Hawe	Shot in circumstances similar to above	11/11/69	BA	'Riot'	North Belfast
Patrick Elliman	Elderly man in street wearing slippers: shot by BA sniper during army-imposed curfew	3/7/70	BA	'Falls Curfew'	West Belfast
William Burns	Died one week later. Shot by BA in Falls Curfew while chatting to neighbours	3/7/70	BA	'Falls Curfew'	West Belfast
Charles O'Neill	Shot by BA in Falls Curfew.	3/7/70	BA	'Falls Curfew'	West Belfast
Zbigniew Uglik	Londoner on holiday shot by BA sniper while climbing over wall to get camera from his hotel. Army 'thought he was a gunman'.	4/7/70	BA	'Falls Curfew'	West Belfast
Daniel O'Hagan	Shot by BA in confrontation with crowd in New Lodge Road. (Local residents said he was unarmed.)	31/7/70	BA	'Riot'	North Belfast
Bernard Watt	Shot by BA in riot: Hooker St., Ardoyne	7/2/71	BA	'Riot'	North Belfast
William Halligan	Shot by BA marksman in Balaclava St.	5/3/71	BA	'Riot'	West Belfast
Seamus Cusack	Shot by BA in riot: Army claimed C had a rifle; civilian witnesses denied this.	8/7/71	BA	'Riot'	Derry City
Desmond Beattie	Shot by BA as above; Army claimed B had a nail-bomb; Lord Gifford, English barrister, held unofficial inquiry: found C & B not armed.	8/7/71	BA	'Riot'	Derry City
Harry Thornton	Shot by BA when his van backfired by RUC Barracks, Springfield Road.	7/8/71	BA	'Riot'	West Belfast

* "BA" stands for "British Army."

NAME	SUMMARY	DATE	AGENT	CATEGORY	PLACE
Franz McGuinness	15 yr-old shot by BA while watching soldier dismantling a bomb during anti-internment riots.	9/8/71	BA	'Riot'	West Belfast
Desmond Healey	14 yr-old shot by BA in Andersonstown during anti-internment riots.	9/8/71	BA	'Riot'	West Belfast
Sarah Worthington	Shot by BA who entered her home believing it empty. BA spokesman at Inquest acknowledged mistake.	9/8/71	BA	'Accident'	North Belfast
Leo McGuigan	Shot by BA on Crumlin Rd.	9/8/71	BA	'Riot'	North Belfast
Noel Philips	Shot by BA in Ballymurphy in anti-internment riots.	9/8/71	BA	'Riot'	West Belfast
Daniel Taggart	Shot by BA in Ballymurphy as above.	9/8/71	BA	'Riot'	West Belfast
Joan Connolly	Shot by BA in Ballymurphy while going for help to R.U.C. station.	9/8/71	BA	'Riot'	West Belfast
Norman Watson	Shot by BA in Armagh while trying to remove car at roadblock.	9/8/71	BA	'Accident'	North Armagh
Fr Hugh Mullan	Shot by BA while trying to give last rites to dying man in Ballymurphy.	9/8/71	BA	'Riot'	West Belfast
John Beattie	Shot on Springfield Rd by BA, who claimed he was driving van being used as cover by snipers.	9/8/71	BA	'Riot'	West Belfast
Edward Doherty	Shot by BA on White-rock Rd.	9/8/71	BA	'Riot'	West Belfast
William Ferris	Shot at Crumlin Road roadblock by BA, who acknowledged mistake. Family recovered £14,500 compensation.	10/8/71	BA	'Accident'	North Belfast
John Lavery	Shot in New Lodge Rd by BA, who claimed he was armed. Soldier's statement not taken till July 72; Inquest (Oct 72) told no evidence of gun was found.	11/8/71	BA	'Accident'	North Belfast
William McKavana	Shot by BA in Markets on suspicion of being armed.	11/8/71	BA	'Accident'	Central Belfast

NAME	SUMMARY	DATE	AGENT	CATEGORY	PLACE
Michael McCartan	16yr-old shot by RUC while painting doghouse on wall in Ormeau Rd. RUC claimed they thought his paintbrush was a gun. RUC later apologised - no prosecutions.	23/7/80	RUC	'Accident'	South Belfast
Michael Donnelly	Social worker shot by BA with plastic bullet. D walking home, not involved in riot when hit according to witnesses.	10/8/80	BA	'Riot'	West Belfast
Jim Bell	Shot by BA outside Cookstown Hotel on suspicion of breaking & entering.	14/8/80	BA	Non-Political Criminal Activity.	West Belfast
Patrick McNally	Shot by UDR patrol on Lower Falls while joyriding in stolen car.	20/3/81	UDR	Non-Political Criminal Activity.	West Belfast
Paul Whitters	15yr-old shot by RUC with plastic bullet in head at 15-16 foot range. W was part of group of youths stoning RUC in hunger-strike riots on Apr. 15. Died 10 days later.	25/4/81	RUC	'Riot'	Derry City
Julie Livingstone	14yr-old shot with plastic bullet from passing BA armoured personnel carrier. She was walking past peaceful anti-H Block protest when hit.	13/5/81	BA	Demonstration	West Belfast
Carol Ann Kelly	12yr-old shot with plastic bullet by BA patrol, some of whom reportedly talked of revenge for their 'S' mates killed in South Armagh'. BA claim riot was taking place. Local witnesses say there was no disturbance until after the shooting.	21/5/81	BA	Deliberate Shooting	West Belfast
Henry Duffy	Shot by BA with plastic bullets in head & chest. D was walking home & not involved in rioting according to witnesses. He died 3 days after being shot.	25/5/81	BA	'Riot'	Derry City

NAME	SUMMARY	DATE	AGENT	CATEGORY	PLACE
Nora McCabe	Shot by BA with plastic bullet from range of 6 feet. Witnesses said she was on way to shops and not involved in rioting.	9/7/81	BA	'Riot'	West Belfast
Danny Barrett	Shot by BA sniper as he sat on wall outside his home in Ardoyne. (See Report, para. 67)	9/7/81	BA	'Riot'	North Belfast
Peter Doherty	Shot by BA with plastic bullet as he stood in his kitchen. BA claimed he threw mummies from window but no one in house was questioned or charged.	31/7/81	BA	'Riot'	West Belfast
Peter Doherty (cont.)	Witnesses deny anything was thrown.	31/7/81	BA	'Riot'	West Belfast
Peter McGuinness	Shot by BA with plastic bullet during a riot. BA said he was a noter, local witnesses say he tried to stop the riot.	9/8/81	BA	'Riot'	North Belfast
Martin Kyle	Shot by BA while joyriding in stolen car.	7/2/82	BA	Non-Political Criminal Activity	West Belfast
Stephen McConomy	11 yr-old shot by BA with plastic bullet at range of 17 feet. (See Report, para. 76).	19/4/82	BA	'Accident'	Derry City

5. Plastic Bullets

70. At the time of our Inquiry's hearings, 11 people had been killed by this supposedly non-lethal riot control weapon. A number of unofficial inquiries had already reported on the plastic bullet's dangers. We were, of course, aware that the European Parliament had condemned these weapons¹ and that, as Home Secretary at the time of serious civil unrest in many parts of Britain in 1981, the then Home Secretary, Mr William Whitelaw, had reportedly refused to allow the British police to use plastic bullets because their use would 'mean inflicting injury or even death on rioters'.²

71. Since 1981, when eight people (four of them children) died from plastic bullet injuries, a number of hearings have been held in the North of Ireland and elsewhere and considerable international concern has been generated.³

Father Raymond Murray and Father Denis Faul supplied us with extensive documentation on plastic bullet killings.⁴

However, as we were preparing our report on the legal implications of the use of plastic bullets, we received details of the death of yet another victim, John Downes, 22 years old.

75. In 1983 the International League for Human Rights raised the issue of plastic bullets in Northern Ireland before the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. (See Appendix D, below). This caused the British Government to submit a written response in August 1983. The League points out that:

All 11 people killed have been Catholics. Inquests held in 1982 and 1983 have found that six of them were not involved in any disturbance which was going on at the time. The adjourned inquest into the death of Mrs Nora McCabe, the mother of two children, is almost certain to come to a similar finding. Thirty year-old Mrs Nora McCabe was shot by the Royal Ulster Constabulary from just six feet away.⁵

76. The Northern Catholic Bishops issued a statement entitled 'Ban Plastic Bullets' on Monday 4 July 1983. It stated, in part:

Many people have been killed by these weapons, some of them very young. Each of these deaths has caused deep grief in the family of the victim. The deaths have generated resentment throughout whole communities and have been the cause of growing alienation among wide sections of the population. The most recent inquest on such a victim, a boy of 11 years old, made the following findings:

- (1) ... there was insufficient evidence to suggest that Stephen McConomy was rioting when he was shot.
- (2) ... he was shot from a range of 17 feet when the minimum recommended range is 60 feet.
- (3) ... the riot gun from which the plastic bullet was fired was faulty.

Rioting is morally wrong but the methods used to control it must also be subject to the moral law. There cannot be one law for the security forces and another for the public. The use of plastic bullets is morally indefensible. The plastic bullet should be withdrawn as a riot control weapon.

77. The Inquiry received evidence that the following have been killed by rubber and plastic bullets since 1969:

<i>Killed</i>	<i>Age</i>	<i>Date</i>	<i>Place</i>
Francis Rowntree*	11	20 Apr 1972	Divis Flats, Belfast
Tobias Molloy*	18	16 Jul 1972	Strabane
Thomas Friel*	21	17 May 1973	Derry City
Stephen Geddis	10	28 Aug 1975	Divis Flats, Belfast
Brian Stewart	13	4 Oct 1976	West Belfast
Michael Donnelly	21	10 Aug 1980	Ballymurphy
Paul Whitters	15	15 Apr 1981	Derry City
Julie Livingstone	14	12 May 1981	West Belfast
Carol Ann Kelly	12	19 May 1981	West Belfast
Henry Duffy	45	22 May 1981	Derry City
Nora McCabe	30	8 Jul 1981	West Belfast
Peter Doherty	33	24 Jul 1981	West Belfast
Peter McGuinness	41	9 Aug 1981	North Belfast
Stephen McConomy	11	16 Apr 1981	Derry City
John Downes	22	12 Aug 1984	West Belfast

* Denotes Rubber Bullets. N.B.: dates given are dates of injury, death frequently occurred some days later.

**International League of Human Rights
Submission to the UN Sub-Commission on
Prevention of Discrimination and
Protection of Minorities
Thirty-Sixth Session**

The Comments of the International League for Human Rights on the U.K. Government's response 29 August 1983 to International League's intervention under Agenda Item 9 concerning restraints in the use of force by law enforcement officials.

1. *Government of the UK:* 'These rounds are, moreover, used only when absolutely necessary'; 'I wish to make it clear that plastic bullet rounds have never been used in non-riot situations.'

International League: The most recent inquest opened on 17 June 1983 on the plastic bullet victims, that of Stephen McConomy, a boy of 11 years old, made the following findings:

- (1) There was insufficient evidence to suggest that Stephen McConomy was rioting when he was shot;
- (2) He was shot from a range of 17 feet when the minimum recommended range is 60 feet;
- (3) The riot gun from which the plastic bullet was fired was faulty.

All 11 people killed have been Catholics. Inquests held in 1982 and 1983 have found that six of them were not involved in any disturbance which was going on at the time. The adjourned inquest into the death of Mrs Nora McCabe, the mother of two children, is almost certain to come to a similar finding. Thirty-years-old Mrs Nora McCabe was shot by the Royal Ulster Constabulary from just six feet away. In the cases of Stephen Geddis, aged 10 years, and Michael Donnelly, aged 20 years, the inquest made no findings on their involvement in disturbances, but on the evidence it seems unlikely that they were rioting.

The *Sunday Times* of London: Derek Humphry described the death of Stephen Geddis. He wrote: 'By all accounts Stephen was not one of the city's wild youngsters. He was withdrawn and rarely

went outdoors, spending most of his time playing with toys and learning the guitar and mouth organ.' On 28 August 1975 a crowd of about 30 boys aged between 7 and 13 began stoning soldiers who were trying to remove some cushions the boys had set fire to in the road. Eye-witnesses said Stephen was not involved in the stoning. Then a soldier, pursuing a group of boys, fired a plastic bullet. Stephen, who was about 40 yards away, was hit on the head. He died 3 days later.

Carol Ann Kelly, aged 12, was hit on the side of the head by a plastic bullet fired by soldiers in a jeep on 19 May 1981. She was returning from a local shop with a carton of milk for her mother. Witnesses agreed that there was no rioting in the immediate area at the time. They said that when the soldiers came into the area they were very agitated. Five soldiers had been killed by a bomb that day in South Armagh and the soldiers were shouting at the residents, 'We'll get you for our five mates today.' At the inquest on 21 May 1983 the coroner described Carol Ann Kelly as an 'innocent victim'.

Paul Whitters aged 15 years was involved in a disturbance on 15 April 1981; five civilian witnesses agreed that he was separated from stonethrowers at the time of the shooting, that he was hit by a plastic bullet fired by a policeman at close range, and they agreed that the police could easily have overpowered and arrested him.

On 28 August 1981 Paul Corr aged 12 years was shot by Royal Marine Commandos returning from a local shop to his home. There was no rioting in the area at the time. The plastic bullet caused severe physical injury requiring extensive plastic surgery.

II. *Government of the UK:* 'Their (The International League for Human Rights) reference to the use of these rounds indoors relates to an occasion on which a single member of the Security Forces was being seriously assaulted by a large crowd. The two plastic bullet rounds were fired at the ceiling in order to assist the recovery of the injured individual.'

International League: According to the *Irish News* a mainstream Belfast daily newspaper, on 12 October 1982 police entered the Lake Glen Hotel in West Belfast and fired plastic bullets at people who were there. Photographs published in the newspaper showed numerous plastic bullet marks on the interior walls of the hotel; many of these were at head level. Members of the public who were present

and the hotel management described the police attack as unprovoked.

The firing of plastic bullets by the Royal Ulster Constabulary and the British Army inside social clubs has been reported on other occasions. For example, on 10 October 1976 British soldiers entered the Ballymurphy Working Men's Club, Belfast, in force. After some of the men present had objected to being photographed the soldiers opened fire with both live rounds and baton rounds. Five civilians were treated at the Royal Victoria Hospital, Belfast, for head wounds, one requiring 24 stitches.

At 9 am on 4 November 1971 a paratrooper, incensed by the playing of an Irish rebel record, fired a rubber bullet through the open window of the home of Mrs. Emma Groves, mother of 11 children. She was hit at about 8 yards range in the face. Both eyes had to be surgically removed.

On 24 July 1981 Peter Doherty was hit by a plastic bullet when he was in a first floor flat of a block of flats. He died on 31 July.

III. *Government of the UK*: 'The Security Forces in N. Ireland are entirely subject to the law and if a member is found to have used more force than was reasonable in particular circumstances he would be charged with a criminal offence. . . all incidents in which persons are killed or injured by Plastic Baton Rounds are fully investigated and a report is sent to the independent Director of Public Prosecutions who decides whether or not it would be appropriate to prefer charges. . . Any complaint against the police or army is also fully investigated and reports again must be submitted to the Director of Public Prosecutions; handling of these complaints is carefully monitored by the independent Police Complaints Board.'

International League: Under Northern Irish law there are remedies for the use of unreasonable force. Criminal complaints can be brought against the law enforcement official and the victim or his family can seek civil remedies for compensation. Substantial compensation has already been paid to rubber and plastic bullets victims in settlements 'out of court'. In most cases where a civil settlement has been reached, there has been no rigorous prosecution of the officers concerned and in no case has there been a conviction.

Although in individual cases there have been police-conducted investigations – albeit inadequate – we re-emphasise that a 'general public investigation' is needed. An overview is long overdue to assess

generally the policy of using the plastic bullets as a riot control device. Since it was introduced into Northern Ireland in 1973, the plastic bullet has caused 11 deaths and numerous physical injuries. An independent and impartial inquiry could identify and evaluate possible existing patterns of abuse and recommend appropriate measures of reform.

IV. *UK Government*: 'I must take issue with their (International League for Human Rights) interpretation of United States Army Research. The U.S. findings were inconclusive and were in connection with a different type of projectile.'

International League: The plastic bullet at 50 yard range has an impact energy of 110 foot pounds. The United States army scientists categorised impact energies of more than 90 foot pounds as in the 'severe damage range'. A weapon with an almost identical impact energy as the plastic bullet, the 'stun-bag', was rejected by the scientists as 'unsatisfactory at all ranges'. Information regarding the impact energy of plastic bullets at ranges of 5, 15, 25, 50 yards were given in *Written Answers* by the British Secretary of State for Defence to British Parliamentary questions at a hearing on 21 January 1977. At 5 yards the plastic bullet has 285 foot pounds of energy and at 50 yards the energy of the projectile is still 149 foot pounds.

V. *UK Government*: 'Their (plastic bullets) use is also strictly monitored to ensure that these instructions are complied with.'

International League: There is no attempt to enforce controls particularly with regard to non-use at short ranges. Rounds must not be fired at a range of less than 20 metres and aiming at the lower part of the body. Yet deaths and serious injuries have been caused by firing at short range and at the head. Laurence Rocke of the Royal Victoria Hospital, Belfast, wrote in the medical journal *The Lancet* 23 April 1983 - 'My impression is that plastic bullets tend to cause more severe injuries to the skull and brain, and therefore more death.'

Additional Findings as to Police Actions and the
Effect of Emergency Legislation:

Towards an Independent Review Procedure

158. We believe that there is an urgent need for impartial machinery to investigate and determine complaints against the security forces. A board or commission should be established on which all communities in Northern Ireland and the security forces themselves would be represented.

This body should also have the duty to review policy matters, including the use of force. It should have the power to adjudicate on police misconduct, with power to subpoena witnesses and to issue findings and recommendations for immediate specific action. Where the security forces oppose any recommendations, a final adjudicating body should have the power to enforce decisions in appropriate cases.

159. An effective review body would foster greater respect for the law. At present in Northern Ireland a significant section of the public believes that the security forces can operate outside the law. Some members of the security forces may themselves share this belief. The more such a belief is held, the greater the need for determined action to stamp it out.

193. Common law police powers are replaced by special powers under which the security forces do not require a search warrant to search homes or other buildings in connection with 'terrorist offences'.⁹ Mere 'suspicion' replaces the common law necessity for 'reasonable suspicion' in entitling a member of the security forces to make an arrest.¹⁰

194. Neither 'reasonableness' nor 'suspicion' are required for the right to stop and search any member of the public and if that person fails to answer to the best of his or her ability all questions concerning identity and recent movements such failure is punishable with up to six months' imprisonment.¹¹

195. The ability of the R.U.C. to obtain confessions is greatly enhanced by Section 11 of the EPA and Section 12 of the PTA, which permit the police to detain a person for interrogation for up to 72 hours (EPA) or, after an initial 48 hours, for a further 5 days (PTA). Suspects are not permitted access to legal advice until at least 48 hours have elapsed.

In Northern Ireland since 1969 the security forces, using wide emergency powers, have detained suspects without trial and brutalised them in interrogations.⁹ Several witnesses told us that they believe summary executions have occurred in some cases.

It is noteworthy that, according to the R.U.C., of those arrested under these powers in Northern Ireland, *some 76% are released without charge.*¹² The figures for Britain are even more startling with 95% of persons arrested under the PTA section 12 released without charge.¹³

156. We received a number of specific complaints. We were told that Seamus Grew made a formal report of an attempt on his life only to find himself arrested and held for three days' interrogation. He then filed a formal complaint that R.U.C. officers had threatened he would be 'in his box before Christmas'. He was killed by the R.U.C.'s undercover surveillance unit before that Christmas. Subsequently, a member of the Ulster Defence Regiment was charged with having attempted to murder Grew in the incident which Grew had reported to the R.U.C. (See para. 54).

We were also informed that Ronald Bunting complained that R.U.C. officers threatened him with death. His formal complaint resulted in a criminal charge of 'wasting police time' on which he was convicted. Shortly after winning his appeal he too was shot dead, allegedly by Unionist paramilitaries. (See para. 47).

Father Murray, Father Faul, Ms Bernadette Devlin McAliskey and others told us that police complaints procedures are widely regarded as a waste of time. Many lawyers said they believe that the R.U.C. are unable to investigate the Army and that they lack the will to investigate their own officers.

202. During the course of our inquiry into the circumstances of several killings of unarmed civilians, witnesses made constant reference to abuses of the security forces' powers under these emergency statutes. Particularly frequent were allegations of abuses in searches of homes, detention and interrogation of persons who were not suspects, repeated stopping, searching and questioning of the same person by the same members of the security forces and other abuses constituting patterns of harassment and intimidation.

203. Complaining about such abuses is widely regarded as futile (see paras. 154 to 156 above) and several witnesses told us that they have reluctantly come to accept that harassment forms a part of their daily lives. We believe that the powers available to the security forces are too broad and unrestrained.

204. Both the EPA and the PTA have been reviewed recently by Government-appointed inquiries but none have been invited to consider whether the legislation should continue on the statute books. As Britain's National Council of Civil Liberties observed in its paper on the new PTA:

Experience in Northern Ireland, which has had emergency powers since 1922, shows that such powers are not a necessary, acceptable and effective response to political violence but one of the chief causes of continued violence. The denial of civil rights feeds the conflict from which the paramilitary emerges. It breeds greater contempt for the Government and for the legal system.¹¹

All of the evidence presented to our Inquiry supports this view and we accept the opinion of the National Council for Civil Liberties that the ordinary criminal law is adequate to deal with violence in Northern Ireland and the rest of the United Kingdom.

11. Conclusions and Recommendations

General Findings

224. The number of civilians shot dead by the security forces in Northern Ireland is unacceptable. At least 155 of the 269 or more persons killed by the security forces since 1969 were civilians with no known connection to paramilitary organisations or activities. The failure of the British Government to curb these killings supports the view that a certain level of death, violence and public resentment is officially regarded as acceptable, on condition that it is primarily confined to one section of the community in Northern Ireland.

225. The law governing the use of deadly force by the police and army in Northern Ireland is inadequate. We find that judges in Northern Ireland and in the British House of Lords have interpreted the law in a manner which allows too much scope for members of the security forces. The attitude of some judges amounts virtually to endorsement of martial law. Internal Army and police instructions on the use of firearms are kept secret from the public and breaches of those instructions go unpunished.

Specific Findings and Recommendations

231. We consider that the British Government in Northern Ireland has violated and continues to violate the international and domestic legal principle that every person's right to life must be protected by the law.

(4) We received evidence that over 269 people have been shot by the security forces on duty in Northern Ireland between 1969 and March 1984. Over 150 of these killings, or 57%, are estimated as unarmed civilian casualties – people with no manifest connection to paramilitary organisations.

(5) Despite the high number of civilian casualties, we found that very few have led to prosecutions. When prosecutions were brought, the results were nearly always unconvincing. We received abundant evidence that public confidence in the evenhandedness of judicial administration has been gravely weakened by the apparent absence of any effective sanctions for the killing of innocent civilians (paras. 37-41).

233. A democratic government has a duty to protect all within its jurisdiction from breaches of the law, whether committed by civilians or by its security forces. The British Government has failed to protect the people of Northern Ireland.⁷

235. The evidence we have heard leads us to conclude that an administrative practice has been allowed to develop in Northern Ireland, by which killings in violation of the European Convention and the International Covenant are at least tolerated, if not actually encouraged. Undercover units of the British Army and the R.U.C. are trained to shoot to kill even where killing is not legally justifiable and where alternative tactics could and should be used. Such administrative practices are illegal in domestic and international law. They should be stopped and training for them should be discontinued immediately (paras. 54 and 55).

236. In conclusion, we find that the misuse of firearms by the security forces in Northern Ireland is part of a broader pattern of human rights violations which has led to a serious breakdown in public confidence in the security forces and in the administration of justice generally. Unless this problem is confronted with determination by a British Government committed to restoring public confidence in the rule of law, we fear that violations will continue and may even spread to other parts of the United Kingdom.

The Diplock Courts are understandably seen as a symbol of injustice by a substantial section of the community. Jury trial is a fundamental guarantee of the rule of law and is so recognised in the United States and many Commonwealth countries, as well as in the United Kingdom. We do not feel that public confidence can be achieved unless jury trial is restored.

(8) We were disturbed by statements made recently in open court by Mr Justice MacDermott and Lord Justice Gibson, when they were acquitting members of the R.U.C. charged with murder (see paras. 54 and 55). These statements imply judicial support for the summary execution of suspects. It is difficult to see how public confidence in the impartiality of the judiciary can exist while these judges continue to try cases arising under the emergency legislation.

Part of the programme necessary for restoring public confidence in the administration of justice in Northern Ireland should be a Judicial Services Commission, which might also provide a complaints machinery to deal with breaches of judicial standards of conduct. The Commission, for which a precedent can be found in the constitution proposed by the British Government for Zimbabwe, would review all proposed judicial appointments and screen applicants for their competence, impartiality and integrity.

(9) The British Government has in recent years failed to take suitably vigorous action to prevent civilian deaths in Northern Ireland at the hands of the security forces. For example:

(a) Since direct rule began in 1972, no official public inquiry into killings by the security forces has been commissioned by the British Parliament. Yet, between 1968 and 1972, four major official inquiries examined alleged improprieties and killings by the security forces (paras. 29-36).

(b) 14 killings by rubber and plastic bullets have been considered by the United Nations Human Rights Commission's Sub-Committee on the Prevention of Discrimination and Protection of Minorities, by the European Parliament and by the European Commission on Human Rights, as well as by independent international tribunals (paras. 71-81).

No prosecution has been brought for any breach of Army Rules of Engagement for PVC Baton Rounds (para. 78).

In August 1984, following the 15th death, that of John Downes, the British Government once again refused to conduct an official public inquiry (paras. 73-75).

(c) The reaction of the British Home Secretary to the near-fatal shootings by the Metropolitan Police in London recently is in sharp contrast to the Government's silence on civilian deaths in Northern Ireland: he immediately assured Parliament that internal police inquiries and a review of police instructions on the issue and use of firearms would take place (para. 101).

2. Excerpts from Reports by the British National Council of Civil Liberties:

The National Council for Civil Liberties has campaigned since 1934 to defend and extend freedom of speech and expression, and to protect the rights of individuals and minorities to equal treatment under just laws. NCCL advises people on their rights; takes cases to courts and tribunals; lobbies Parliament and Government through an all-party Parliamentary Civil Liberties Group; publishes pamphlets about people's rights; and organises campaigns for law reforms. Funded solely by subscriptions and donations, NCCL is the largest independent organisation working for human rights in the United Kingdom.

NCCL Statement on Violence and Emergency Legislation:

NCCL is utterly opposed to terrorist activity. We have consistently condemned those who have turned to assassinations and bombings in their desire to change or defend the present constitutional status of Northern Ireland.

Our opposition to terrorism is in no sense compromised by our opposition to laws such as the Prevention of Terrorism Act which were supposedly introduced to curb terrorist activity. Our position has often been misrepresented by those who believe that criticism of emergency legislation must imply support for the terrorists. Nothing could be further from the truth. We oppose emergency legislation because it diminishes the rights of *all* citizens by providing the Government, the police and the army with powers unchallengeable in the courts, and by corrupting the standards which are central to the administration of justice. NCCL opposes terrorism not only because terrorists threaten the lives of citizens, but because their activities provide the apparent justification for drastic curtailment of traditional liberties.

The Special Powers Act existed in Northern Ireland from 1922 to 1973.

The NCCL issued a Special Report* on the Special Powers Act in 1936. After a detailed examination and analysis of the evidence, the Report concluded:

Firstly, that through the operation of the Special Powers Acts contempt has been begotten for the representative institutions of government.

Secondly, that through the use of Special Powers individual liberty is no longer protected by law, but is at the arbitrary disposition of the Executive. This abrogation of the rule of law has been so practised as to bring the freedom of the subject into contempt.

Thirdly, that the Northern Irish Government has used Special Powers towards securing the domination of one particular political faction and, at the same time, towards curtailing the lawful activities of its opponents. The driving of legitimate movements underground into illegality, the intimidating or branding as law-breakers of their adherents, however innocent of crime, has tended to encourage violence and bigotry on the part of the Government's supporters as well as to beget in its opponents an intolerance of the 'law and order' thus maintained. The Government's policy is thus driving its opponents into the ways of extremists.

Fourthly, that the Northern Irish Government, despite its assurances that Special Powers are intended only against law-breakers, has frequently employed them against innocent and law-abiding people, often in humble circumstances, whose injuries, inflicted without cause or justification, have gone uncompensated and disregarded.¹⁰

The NCCL issued a clear warning to the British authorities as to the dangers of continuing the emergency legislation and its discriminatory enforcement:

The fact that the Government's opponents have not been driven to adopt a policy of systematic violence, but rather to repudiate such course, is one of the hopeful features in the present state of Northern Ireland. But at the same time there can be no doubt that large numbers of persons, particularly amongst the youth, who would normally owe allegiance to the constitutional Nationalist party, are being driven into the Republican movement.¹¹

* The Report was entitled A Report of A Commission Appointed to Examine the Purpose and Effect of the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 & 1933. Members of the Commission were Edward Digby, K.C., J.P.; Edward Mallalieu, a barrister and former MP; William McKeag, a solicitor and former MP; Margery Fry, former secretary to the Howard League for Penal Reform. Secretary to the Commission was Neil Lawson, now Mr. Justice Lawson.

In 1973, the British Government replaced the Special Powers Act in Northern Ireland with the Emergency Provisions Act. In 1974 it enacted the Prevention of Terrorism Act (the "Act") which is effective throughout the United Kingdom.

The following pages (32B-53B) are taken from the NCCL's report* on the Act entitled The Prevention of Terrorism Act: The Case for Repeal (1983).

There were three sections to the Act, the first dealing with the banning of organisations; the second with the exclusion of suspected terrorists at the discretion of the Secretary of State; and the third with the extension of police powers to hold for questioning any person suspected of connection with terrorism. The measures were to last for six months only, although the Act could be renewed — in whole or in part — after that date.

The Prevention of Terrorism Acts of 1974 and 1976 brought to Great Britain the emergency legislation under which Northern Ireland has been governed for over 50 years. The Acts have destroyed safeguards for the liberty of the individual won over centuries; by replacing legally defined and protected rights with arbitrary executive powers, they have violated cardinal principles of the rule of law.

The experience of the last 45 years and, particularly, of the last decade has borne out our contention that emergency powers are *not* a necessary and acceptable response to political violence, but one of the chief causes of continued violence. Denial of civil rights and the implementation of emergency powers feeds the conflict from which the terrorist emerges.

*The report focuses on the 1976 version of the Act. The Act was amended for the third time last year. The conclusions reached in this report are not affected by the rather insubstantial 1984 amendments.

NCCL's objections to the Act

The Government originally justified this 'draconian' Act, described by the Home Secretary as 'unprecedented in peacetime', on the grounds that a panic-stricken country would take the law into its own hands unless the Government stepped in. It was sold to a willing Parliament as a temporary expedient — an Act with built-in obsolescence which would automatically lapse unless emergency conditions justified renewal. The emergency nature of the legislation has now been largely forgotten — not least by the police — and the failure of a concerted campaign to repeal the Act has meant that it has, in practice, become an integral part of our criminal law.

Six years experience of the operation of the Acts have more than justified NCCL's initial opposition. The basic objections to the powers given to the Home Secretary and the police — the executive arm of government — may be summarised as follows.

In the United Kingdom, where the rights of citizens are not protected by a Bill of Rights, Parliamentary scrutiny and judicial review provide the only methods of preserving civil liberties in an emergency. But the 1974 Bill was rushed through all its Parliamentary stages in two days without any pretence of full and thorough scrutiny of its provisions. The 1976 Act doubled the period of renewal from six to 12 months, and renewal debates on both Acts have generally been brief and ill-attended. Although a small minority of MPs have stood out against the Acts, renewal has year after year secured the support of the overwhelming majority.

By giving the Home Secretary and the police powers which cannot be challenged in the courts, the Prevention of Terrorism Acts have destroyed at a stroke the edifice of safeguards built up in this country's legal system to protect the citizen against wrongful arrest, detention or conviction. Exclusion is identical in many essential respects to the discredited power to intern without trial: it allows the police, where they have no evidence on which to prosecute, to apply for an *executive* order against the suspect. The Home Secretary is given the unlimited power to decide — in secret and on the basis of evidence never made known to the suspect, his lawyers or the public — whether or not the suspect is in fact involved in terrorism. Thus, vital features of the rule of law — the right to know the charges, the right to hear and challenge the evidence, the right to a fair hearing and the right of appeal — are abolished. The open decision of a court has been replaced by the secret decision of the police, civil servants and a Minister. The inevitable result is that innocent people are deprived of their freedom on evidence which would never stand up to the scrutiny of a court of law.

The NCCL predicted in 1974 that the existence of the new police powers combined with public pressure against Irish Republican sympathisers would lead the police to indulge in 'fishing trips' which would waste police manpower, result in few criminal convictions and harden attitudes. And the *Daily Mail* stated:

The net effect of these special powers as far as the police are concerned is that they will be freer to harry, harass and interrogate terrorist suspects and terrorists sympathisers.

Now after each incident, such as the murder of Airey Neave or Lord Mountbatten, mass arrests under the Prevention of Terrorism Act are made and widely reported, although many of those detained are in fact not connected or involved with the crime which served as the pretext for their detention. The ordinary criminal law, which requires the suspect to be arrested on reasonable suspicion of an offence, gives the police more than adequate powers to bring suspects against whom there is real evidence to court: the Prevention of Terrorism Act, on the other hand, allows the police to arrest, detain and interrogate those against whom there is no evidence at all.

Central to the English legal system is the principle that a person is innocent until proved guilty. But repeatedly under this Act it is the innocent person who must establish his case. Those who have been detained and released without charge — the vast majority of those held under the Act — are frequently referred to by Home Secretaries as 'terrorists', while the records held on them by the police ensure that having once been detained and released they will again become objects of entirely unjustifiable suspicion. Someone faced with an exclusion order is offered the almost impossible task of persuading the Home Secretary and his advisers that the accusations against him — of which he knows nothing — are unfounded. The attitude amongst supporters of the Acts seems to be that this shift in the burden of proof is unimportant — after all, 'innocent people have nothing to fear'. The reality is that for 'innocent' one should read 'non-Irish, not involved or interested in Irish politics, does not live, work or mix socially with Irish people, does not read literature concerning Ireland, does not belong to a political party or other body which might be critical of British Government policy in Ireland'.

The experience of emergency powers in Northern Ireland has demonstrated that mass searches, arrests for interrogation, detentions to obtain confessions and internment without trial have been counterproductive in combating violence. The effect has been to harden attitudes amongst both communities. Civil liberty groups in Northern Ireland have recorded the increased reluctance of both Protestant and Catholic working-class communities to co-operate with the police and security forces following publicised instances of discriminatory or arbitrary action. In ending the use of the internment power, the Government itself acknowledged that executive powers which further undermined confidence in the institutions of the law could actually contribute to the violence with which they were designed to deal. Terrorist organisations must recruit to survive: recruitment is more easily sustained in a community resentful of the law and its operation. If the Prevention of Terrorism Act were used for the detention and exclusion of Irish people living in Britain on a larger scale — and there is nothing whatsoever in the Act to prevent mass arrests and expulsions — the result could well be a renewed spiralling of violence. The injustices which the operation of the Acts have so far caused in their use against the Irish community in Britain have already led to fear and alienation amongst ordinary, law-abiding families.

The European Convention on Human Rights permits governments to 'derogate' from most of its provisions during an emergency. Although the British Government has entered a notice of derogation for the Emergency Provisions Act, it has taken the view that the Prevention of Terrorism Act does not infringe the Convention. NCCL has challenged this view by representing a number of people arrested or excluded under the Act in cases under the Convention. In our view, the Act infringes Article 5 (the right to liberty), Article 6 (the right to a fair hearing), Article 8 (respect for private and family life), Articles 10 and 11 (freedom of expression and assembly) and Article 14 (prohibiting discrimination in the protection of these rights on grounds of national origin). Three cases of people detained under the Act have now been declared admissible by the Human Rights Commission.

Supporters of the Act argue that civil liberties must be sacrificed to deal with those suspected of terrorism. They are wrong. First, there is no evidence at all that the Act has been used to deal with terrorists: the vast majority of those arrested have been released without being charged or excluded. Secondly, the right to a fair trial is just as important for someone suspected of a terrorist crime as for any other suspect. Indeed, given the overwhelming horror which juries and judges rightly feel when dealing with terrorist crimes, safeguards for the suspect are arguably even more important than in lesser cases. But the abolition of all safeguards — indeed, the virtual replacement of trials in a court of law by secret executive decisions — immeasurably increases the risk that an innocent person will be convicted or excluded. The result is not only an injustice to the innocent person and his family: the result is that the genuinely guilty escape. Neither injustice nor inefficiency assists in the fight against crime. And thirdly, the Act's powers are unnecessary. The small minority of those arrested under the Act and later charged with a criminal offence could, and should, have been arrested under normal, pre-existing police powers, and brought before a court in the usual way.

One provision of the Prevention of Terrorism Act permits the Government to ban certain organizations:

Banned organisations

What the Act says

The Prevention of Terrorism Act gives the Secretary of State the power to ban an organisation which 'appears' to him to be concerned with terrorism in any part of the United Kingdom, relating to Northern Irish affairs. The Irish Republican Army was the only banned organisation specified in the 1974 Act and it has remained banned ever since. On 3 July 1979, the Irish National Liberation Army — which had claimed responsibility for the murder of Airey Neave — was also banned. No other organisations are banned under the Act.

'Terrorism' is defined as the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

A person may not:

- (i) belong to a proscribed organisation;
- (ii) raise or receive money or goods on behalf of a proscribed organisation;
- (iii) encourage any other form of support for a proscribed organisation;
- (iv) organise a public or private meeting of more than two people in support of a proscribed organisation;
- (v) organise a public or private meeting addressed by a member of a proscribed organisation, even if he is addressing the meeting on something unconnected with Northern Ireland affairs.

In addition to these offences the 1976 Act also created a number of offences which relate to support for 'terrorism' in general, rather than to support for a proscribed organisation. Someone who knows or suspects that his money or goods are being used in connection with the 'commission, preparation or instigation' of acts of terrorism in the UK, connected with Northern Irish affairs, can be charged with an offence regardless of whether he is connected with a banned organisation.

It is an offence to:

- (i) ask for a gift or loan which is intended to be used in connection with terrorism;
- (ii) receive or accept any money or other goods which is intended to be used in this connection;
- (iii) give or lend, or make available in any other way, any money or goods, knowing or suspecting it will be used in this connection. (Section 10.)

The penalties are the same as for the offences relating to banned organisations.

For any of these offences, as well as for those relating to banned organisations, a suspect can be arrested and detained without a warrant.

In 1976, when the new Bill was introduced, the Home Secretary was unperturbed by the fact that the section concerning banned organisations had hardly been used — producing one conviction in 16 months. He argued that it was preventive in intention, the absence of convictions being a sign of success! Despite this accomplishment, the Government proposed an increase in the penalties for openly displaying support for a proscribed organisation, from a £200 fine and/or three months' imprisonment to a £400 fine (later increased to £1000) and/or six months' imprisonment. No justification for the increased penalty was ever offered.

Section 10, relating to support for terrorism generally, was however a new departure. No loyalist paramilitary organisation has been banned under the Prevention of Terrorism Act. But support for a *lawful* organisation is now suspect.

In its report on offences against the person, published in March 1980, the Criminal Law Revision Committee rejected the proposal to make terrorism as such a criminal offence. It is easy to see why the Committee was right. 'Terrorism' is incapable of a precise definition, as the Prevention of Terrorism Act itself illustrates. Terrorist *activities* are already in themselves criminal offences. If terrorism itself is not an offence, it is wrong to make support for terrorism — falling short of involvement in terrorist activities — a crime. Any support for criminal activity, whether involving terrorists or anyone else, should be prosecuted under the general law of incitement, conspiracy or the liability of accomplices. Of the 49 people who have been prosecuted under the 1976 Prevention of Terrorism Act as a whole, 26 (53 per cent) have been convicted under section 10 — an indication that the section is used where there is no evidence of support for, or involvement in, a banned organisation and no evidence of criminal activities.

The effect of bans

Proscription has inevitably led to the curtailing of debate and legitimate political activity by groups campaigning peacefully on Irish matters. The passing of the Act created an unease — in part justified — that a person could be charged for beliefs rather than criminal activity. The form of words used blurs the distinction between members of a banned organisation and Republican or Loyalist sympathisers. After November 1974 both Provisional Sinn Féin and Clann na h'Eireann, which pursue political campaigns for similar objectives to those of the Provisional and Official IRA respectively, restricted their political activities for fear of a charge under the Act. The atmosphere at that time can be gauged from press reports that people were afraid to be associated with anything Irish. Even Irish harps had apparently been destroyed!

NCCL has also been told of local groups' reluctance to show films such as 'Ireland Behind the Wire' which were critical of the treatment of the minority community in Northern Ireland in general, and of internment and its implementation by the British Army in particular. NCCL also received reports that many pubs and clubs had refused access to collectors of any description, even from charities with established credentials.

Certainly since 1974 there has been an increasing reluctance on the part of those with no direct commitment to Northern Ireland politics to involve themselves in any way, however peripheral. The Troops Out Movement have on numerous occasions experienced difficulties in booking halls. Rallies are banned from Trafalgar Square if they relate to Northern Ireland or are called by an organisation connected with the province (the Peace People were given special dispensation by the Secretary of State for Environment). Even the British Peace Committee were refused permission to hold a rally in the square.

The Act also affects in a fundamentally racist way the lives of Irish people in Britain. Tom Walsh, public relations officer and former chairman of the Federation of Irish Societies in Britain has written to NCCL as follows:

The Prevention of Terrorism Act affects the ordinary Irish person living and working in this country . . . The only qualification to be suspect and to be questioned, fingerprinted, photographed (by the police) is to be Irish. The only way the tragic circumstances of the last ten years can be brought to a happy conclusion is for there to be discussions and political debate and constant seeking for a solution but this possibility is hindered by the PTA. Irish people, since the Act became law, are afraid to discuss the situation, are afraid to be in possession of or read articles and literature about the situation . . .

The Act has been tragically successful in that it has terrified the ordinary Irish people in this country. I have met people who are afraid to write to their MP or to a newspaper expressing concern about the situation in the North. I know people who threw away books on Ireland which were treasured possessions. I know people who want to object to the more obnoxious and insulting 'Irish jokes' but who are afraid to because they remember vaguely the publicity at the introduction of the Act and how easy it would be to be branded a terrorist.

It was clear at an early stage in the Act's operation that the bans themselves were not of major importance. Both the Home Office and the police had argued against a ban on the IRA until after the Birmingham bombings when the ban was said to be necessary to placate public opinion. The real value of the ban, in the eyes of the authorities, was that it allowed a wide range of activities unconnected with criminal offences to be curtailed. Ian Gilmour MP, who was spokesman for the Conservative Party during the 1974 debate on the Act, confirmed his party's view when he said in that debate: 'I think, too, that it has cut down the activities of both the political wings of both the Provisional and Official IRA, and that also is to the good.' The same party has (rightly in NCCL's view) rejected calls for a ban on the National Front or its political activities on the grounds that, however objectionable their views, democracy demands that they be allowed to exist.

Against the bans

Membership of an illegal organisation is difficult to prove, unless admitted. In Northern Ireland the frequent refusal of members of paramilitary organisations to recognise the court is usually taken as an admission of guilt. Most of those charged with 'membership' in Northern Ireland were also charged with a more serious offence, so that if the judge acquitted the defendant of the heavier offence, the membership charge acted as a net to ensure conviction.

Proscription has been rejected in the past on the basis that the police considered it would make detection more difficult. Roy Jenkins made it clear, when introducing the ban, that proscription itself would not reduce terrorism. Previous Home Secretaries had refused to consider proscription on the grounds that new organisations with the same aims and methods would emerge under a different name or that activities and supporters would disappear underground, hampering the surveillance work of the police. On this point, however, it should be noted that there is nothing to prevent the Secretary of State banning the IRA and 'like organisations', so that groups may be banned without their knowledge.

Lord Shackleton in his report stated that proscription of the IRA had not, in the view of the police, made more than a marginal contribution to the curtailment of the activities of the IRA, and the justification for it did not derive principally from its 'operational' value.

There is no doubt that many people in Northern Ireland, as in Great Britain, find the views of Republican supporters offensive — just as many people find the views of Loyalists and Orange Order members offensive. The Act has not prevented the publication and distribution in Northern Ireland of Republican newspapers which describe the Provisional IRA as freedom fighters and attacks on civilians and soldiers as victories. Nor has it prevented the expression of extreme Orange views. The literature whose distribution had led to prosecutions under the Act in Great Britain is in fact far less 'offensive' than much which is freely obtained in Northern Ireland. The effect of the Act is simply to restrict even further the range of opinions available to those people in Britain interested in the situation in Northern Ireland.

But the central point is that no organisation should be banned and no publication censored simply because it is offensive. Freedom of association and expression, which are fundamental to political activity in a democracy, involve the right to make one's views known and to organise with others of a similar conviction. It is inevitable that some views expressed in a democratic community will be deeply objectionable to other people. They will also be deeply objectionable to those in authority, who are inevitably tempted to respond, not to the arguments or views expressed, but by banning the organisation or prosecuting the individuals involved.

Moreover, a brief examination of the history of Northern Ireland shows just how futile bans are. The ban on the IRA and other organisations under the Emergency Provisions Act has not prevented the organisations from existing. Nor has the ban diminished support for their views. The various means used by the British Government within Great Britain itself to curtail the expression of different points of view about Northern Ireland have simply helped to ensure that the British public has little or no understanding of the situation in that part of the country and that the Government can take almost any measures without serious debate or opposition. That policy of censorship has not helped the British Government achieve security or peace in Northern Ireland; it has seriously undermined democratic freedoms throughout the whole of the United Kingdom; and it has left the public, most MPs and most of the press utterly complacent about the measures which it is right for a government to take in dealing with opposition.

A second provision of the Prevention of Terrorism Act sets up a system of "internal exile" within the United Kingdom:

Exclusion orders

What the Act says

Under this part of the Act, it is important to remember that Great Britain means England, Scotland and Wales; United Kingdom means Great Britain and Northern Ireland.

Under the Act, any Secretary of State — it will usually be the Home Secretary or Northern Ireland Secretary — can decide to make an exclusion order against a person if:

- (i) it appears to him expedient, in order to prevent acts of terrorism intended to influence Government policy or public opinion with respect to Northern Ireland affairs, *and*
- (ii) he believes that a person is or has been concerned in the 'commission, preparation or instigation, of acts of terrorism, or
- (iii) he believes that a person is attempting to enter Great Britain or Northern Ireland, with a view to being concerned in the 'commission, preparation or instigation of acts of terrorism.

'Terrorism' is defined as the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear. The definition is wide enough to include almost any connection, however remote, with terrorist activity.

UK Citizens

If a person is a United Kingdom citizen he cannot be excluded from the United Kingdom completely. But he can be restricted to living either in Northern Ireland or in Great Britain.

Effects of an Exclusion Order

A United Kingdom citizen subject to an exclusion order is removed from Great Britain to Northern Ireland and is prohibited from entering Great Britain or being there. The Act permits someone to be excluded *from* Northern Ireland to Britain, but no such exclusion orders have been made. No UK citizen can be excluded from both Northern Ireland and Great Britain.

A citizen of a foreign country who is excluded will be prohibited from entering or being in any part of the United Kingdom.

The excluded person can make representations against exclusion within 96 hours of notice being served upon him and he also has a right to request an oral hearing before a government Adviser. In 1980, the Advisers were Lord Alport, Lord Underhill and John Newey QC.

If the Secretary of State does not consider the representations frivolous, he will refer them to the Adviser. If a request for an interview with the Adviser is made and the person has not 'voluntarily' left the country, he has a right to such an interview. If he has been removed with his 'consent' but changes his mind within the 96 hour limit, he may make written representations but has no right to an oral hearing. If a person is served with an exclusion order, he is normally transferred from police custody to prison seven days after arrest. From 25 March 1980, a person may be held in police custody for a further 24 hours (eight days in all) if arrangements are being made for his removal — that is, either he consents to removal or has made no representations. After receiving the representations and, where applicable, the report of the Adviser, the Secretary of State will make his own decision as to whether or not the order should be revoked.

A person subject to an exclusion order has no right:

- to know the evidence on which the exclusion order is made;
- to cross-examine on the evidence;
- to have a public or formal hearing;
- to know on what basis the representations were successful or unsuccessful;
- to appeal to a court or tribunal against exclusion.

The Secretary of State may at any time revoke an exclusion order by a further order. Following the Shackleton Report, the Home Secretary announced on 18 June 1979 that each exclusion order would be reviewed three years after it was made.

Criminal offences

Under the Act, it is a criminal offence:

- (i) not to obey an exclusion order once notice has been served;
- (ii) to help any person who is known or ought to be known to be subject to an exclusion order, to enter the country against the order;
- (iii) to harbour a person who is subject to an exclusion order.

For any of these offences a person may be arrested without a warrant although the Attorney General must give his consent before prosecution. Maximum penalty on conviction in the magistrates' court is £1000 fine and/or six months' imprisonment; in the Crown Court an unlimited fine and/or five years' imprisonment.

Detention at ports of entry

Under the Act, if a person is entering or leaving Great Britain or Northern Ireland (including people coming in as transit passengers), he can be detained at the port of entry, while the Secretary of State decides if he wants to make an exclusion order. The person can be detained by any 'examining officer' — i.e. a police officer, an immigration officer or a customs officer working as an immigration officer (and, in the case of Northern Ireland only, a soldier). The Government has given an undertaking that a person subject to an exclusion order, in transit at a United Kingdom port, will not be deemed to have broken his exclusion order.

A person can be detained for 48 hours and then for another five days on the authority of the Secretary of State pending a decision whether or not to make an exclusion order.

The record in Great Britain

Between 29 November 1974 and 30 September 1980, 291 applications for an exclusion order were made, of which 35 were refused by the Home Secretary. Ten orders were revoked before the person was removed, and eleven others were revoked after the person had been removed. Of these 21 revocations, 13 were revoked following representations (out of a total of 41 contested orders); two following a review of 20 orders, which had been in force for three years; six 'for other reasons'. Of the 256 exclusion orders made, 171 were made against a person detained at a port or airport and 61 against a person detained elsewhere. Twenty-four were made against a person not detained under the Act. Two hundred and one excluded persons were returned to Northern Ireland, 34 to the Republic of Ireland. Ten persons were already outside Great Britain when the order was made. No-one was excluded from Northern Ireland to Great Britain.

The arguments against

The introduction of exclusion orders has given the United Kingdom its own system of 'internal exile'.

Lord Shackleton concluded: 'Exclusion is not a judicial proceeding and it involves no charges, trial or court. Nor is it a punishment'. But exclusion involves compulsory removal to another part of the country; separation from friends and, often, family; a prohibition on return; and, for those returned to Northern Ireland, a risk of injury or death in the violence. It is precisely because exclusion is a punishment imposed *without* judicial proceedings that it is so objectionable.

The majority of exclusion orders have been made against United Kingdom citizens who are now forced to live in Northern Ireland, even though they have chosen to live in Britain and have been resident here for anything up to 20 years. An excluded person has no right to know what he is suspected of, no right to hear or challenge the evidence, no right to a trial. Because the police 'evidence' against him is known only to government ministers, civil servants and the Adviser, any independent assessment of its worth is impossible.

As long as the suspect and his lawyer are refused the right to know the accusations made against him, the right to challenge the evidence and cross-examine prosecution witnesses, and the right to a judicial hearing and appeal, there must be an overwhelming probability that people are excluded on the basis of inaccurate evidence. But an exclusion order can be as damning as a criminal conviction.

Legal advice obtained by the NCCL indicates that it is impossible to challenge an exclusion order in the courts. The Act gives the Secretary of State the power to exclude anyone provided he is 'satisfied' that the excludee is involved in terrorism. The Home Secretary's subjective judgement can only be challenged if the excluded person can show evidence that the decision was made in bad faith — an impossible task. The only way of establishing evidence of bad faith would be to commence a legal action and obtain all the documentation involved in the case — but such disclosure would be refused on the grounds that it would be damaging to 'the public interest'.

NCCL believes that the system of exclusion violates the European Convention on Human Rights, Article 6 of which provides that in the determination of his civil rights or in any criminal proceedings against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Furthermore, anyone charged with an offence has the right to be informed of the nature and cause of the accusation against him and to challenge witnesses. Article 14 of the Convention provides that implementation of Convention rights must be made without discrimination on grounds of religion or national origin. And Article 13 provides that anyone who believes that his Convention rights have been infringed shall have the right to a remedy within his own country. As we have seen, it is impossible to challenge an exclusion order in the British courts, while *habeas corpus* has proved ineffective in Prevention of Terrorism Act cases (see page 45).

The existence of the exclusion power has made it impossible for the United Kingdom to ratify Protocol Four of the Convention, which declares the right to freedom of movement within one's own country and the right to choose one's own residence.

The notice of exclusion gives no reasons for the decision to exclude. In the case of a non-United Kingdom citizen excluded from the United Kingdom, the notice takes the following form:

The Secretary of State is satisfied that you _____ are concerned in the commission, preparation or instigation of acts of terrorism. In pursuance of sections 4(1) and 6 of the Prevention of Terrorism (Temporary Provisions) Act 1976 the Secretary of State has made an exclusion order prohibiting you _____ from being in, or entering the United Kingdom. Under Section 9 of the Act a person against whom an exclusion order has been made commits an offence if he fails to comply with the order. The maximum penalty for this offence is five years imprisonment, and unlimited fine or both.

If you object to the exclusion order you may, within 96 hours, make representations to the Secretary of State in writing setting out the grounds of your objection. You have a right to a personal interview with a person, appointed by the Secretary of State, who will advise him on your case. If you wish to make representations objecting to the making of the order and you wish to have a personal interview with the adviser, you should send your representations and request to the Secretary of State, Home Office, Whitehall, London SW1.

I, _____ do/do not* wish to make representations objecting to the exclusion order which the Secretary of State had made against me. I do/do not* wish to have an interview with an adviser to the Secretary of State.

(*delete where applicable).

Excluded Persons

Former Home Secretary, Roy Jenkins, claims to have rid Britain of 'dangerous terrorists' — 'the most experienced leaders of the Official and Provisional IRA'. One would expect such people to be of considerable interest to the security forces of Northern Ireland, which has been landed with most of these 'experienced leaders'. But only one excluded person has been arrested and charged with an offence.

In February 1978, John McKenna was excluded. He had come to live in Britain five years earlier and married an English woman. They settled in Kent and had two children. He was arrested under the Act, detained from questioning, transferred to Brixton prison and served with an exclusion order. His representations were rejected and he was flown to Belfast. Like other excluded persons, he was not arrested there and he returned to the Falls, to the Catholic estate in Belfast where he had grown up. His English wife — who is not a Catholic — and their two daughters decided they had no choice but to follow him, even though his wife had little prospect of settling down and neither of them has any prospect of getting a job. The Kent solicitor who made representations on his behalf objected strongly to the whole proceeding:

The Act however works extremely harshly and no doubt unfairly in cases such as Mr McKenna where there must be a real doubt as to whether or not he was really involved in any terrorist activities in Northern Ireland or in England which would have justified his exclusion from England . . . One of my main concerns with this case is the fact that Mr McKenna's wife is English and the two children of the marriage were born in England whereas the making of the exclusion order virtually forced her and the children to leave their country of origin.

The solicitor also pointed out, that since the suspect faced with an exclusion order is never charged with a criminal offence, no legal aid is available other than the extremely limited 'Green Form' scheme. The excludee therefore either has to find private funds or depend on the willingness of a solicitor to take on the case without payment.

On 12 December 1979, the police raided a large number of homes in London, Southampton, Birmingham and Liverpool. Amongst those detained in Southampton were James Martin, his wife and two of their children. A third child was away at the time. Although Veronica Martin and the children were released after 11 hours, James was detained for seven days until he was excluded. After reaching Northern Ireland, he made unsuccessful representations. James had lived in this country for 19 years — only one year short of the time-limit for exemption from exclusion. All three children were born in Britain. The Martin family decided they had no option but to go to Belfast.

Because of the exclusion order, James Martin lost his job and Veronica did not work. The Northern Ireland Housing Executive refused to house them and Veronica was unable to obtain financial assistance with the costs of removing their furniture from their council house in Southampton.

The power of exclusion does not affect only those against whom an order is made. NCCL has received disturbing reports from people who allege that, having travelled from Ireland or Northern Ireland to Britain, they have been ordered by the police to return home. With the threat of detention and permanent exclusion hanging over them, such people do not normally protest: but the 'exclusion' never appears in the official record.

In many cases, the exclusion of the only or main breadwinner forces the family to choose between going to Belfast or remaining in poverty in Britain. The family may have left Belfast in the first place to escape the troubles; the wife and children may in fact be English and understandably unwilling to move to a strange city, devastated by a decade of violence. The problems are even greater if the marriage is 'mixed'. As Gerry Fitt MP said about a number of his constituents during the debate on the 1976 Bill:

'The men involved are Belfast men married to English wives, and their children are English born. The men have been in steady jobs while they have live in Southampton. Their children go to English schools and speak with English accents. They are unsuited to be sent back to Northern Ireland to live in areas where an English accent might get them into trouble. I have spoken to these people and I am convinced that they are not and never have been involved in terrorist activities in this island.'

A third provision of the Act:

Arrest and detention

What the Act says

Arrests

Under the Act, a police constable can arrest a person without a warrant if he reasonably suspects:

- (i) that he belongs to or supports a proscribed organisation and/or
- (ii) that he is subject to an exclusion order, or has helped or harboured any other person who is subject to an exclusion order and/or
- (iii) that he is concerned in the 'commission, preparation or instigation of acts of terrorism' — whether or not these are concerned with Northern Ireland affairs.

Detention

Once a person has been arrested he can be held by the police for up to 48 hours and then for another five days on the authority of the Secretary of State. During this time a suspect need not be charged with an offence, nor brought to court. This is a massive departure from the normal legal position which, even for serious offences, requires the suspect to be brought before a court 'as soon as practicable' after being charged.

The Judges' Rules — the guidelines for treatment of people under police questioning — apply to arrests under the Act. So a suspect should be allowed to contact his family and a solicitor; remain silent when questioned; and to consult a solicitor. But Section 11, making it an offence to withhold information has effectively abolished the right of silence, and many of those detained under the Act are not allowed to see a lawyer or contact friends.

Search

The Act also gives the police the power to stop and search, without a warrant, anyone suspected of involvement in terrorism, in order to establish whether the suspect has any documents or articles on him which could show that he was also liable for arrest.

A police officer who is searching premises with a search warrant is allowed under the Act to search every person found in the premises named in the warrant. An officer with the rank of superintendent or above can sign a note authorising a search, if he considers the case is one of great emergency and immediate action is necessary 'in the interest of the state' — thus removing the need to obtain a magistrate's approval.

Any officer using these powers of search, can seize anything which he has reasonable grounds for suspecting to be evidence of an offence relating to a proscribed organisation or an exclusion order. He can also take anything which he reasonably suspects is evidence which would be sufficient to justify the Home Secretary in banning an organisation or making an exclusion order.

Operation of the Act

Between 29 November 1974 and 30 September 1980, 4,977 people have been arrested, of whom 642 were held for more than 48 hours. Of these 3,574 were held at ports of entry and 1,403 elsewhere. Two hundred and thirty-two people were served with exclusion orders, 69 were charged with offences under the Act, 20 with conspiracy to commit offences under the Act and 248 with other offences.

Of nearly 5,000 people arrested and detained during the six years' operation of the Acts, the vast majority — 89 per cent — have neither been excluded nor charged with a criminal offence. Of the 1081 people arrested during 1979 and the first nine months of 1980 who were released without charge or exclusion, 193 (18 per cent) were detained for longer than 48 hours, including 29 held for between six and seven days.

In all, only 337 people — 6.8 per cent of those detained — have been charged with criminal offences. Although many of the offences involved were extremely serious — including murder, firearms and explosives offences — the largest single group of charges (65 in all) were theft or similar offences not involving violence. Of the 69 people charged under the Act itself, charges were dropped in two cases and nine people were acquitted. Three were awaiting trial and 55 people were found guilty. Of the 268 charged with other offences, charges were dropped in 23 cases and 27 were acquitted. Forty three people were still awaiting trial when the statistics were published. Of the 175 people convicted, 74 received non-custodial sentences (a fine or an absolute or conditional discharge); 20 were imprisoned for twelve months or less, 22 for between one and five years and 42 for five years or more.

The vast majority of arrests have taken place in Liverpool (1203, 24 per cent), London (1072, 22 per cent) and Dumfries (952, 19 per cent). In all, 72 per cent of arrests under the Act have taken place at ports or airports used by those travelling between Britain and Ireland and Northern Ireland.

Summary

The conclusion to be drawn from an examination of general police powers and the use to which the Act has been put, is that the actual use is to allow the police to detain and question Irish people, or people who have some connections with Ireland — even where there is no evidence of suspicion of involvement in a terrorist crime. The power to arrest people effectively at random for the purpose of detaining and questioning them for up to seven days is unacceptable in principle and irrelevant to the need to arrest and bring before the courts those suspected of criminal offences.

A final provision:

Withholding information

What the Act Says

Under Section 11, a new provision in the 1976 Act, it is an offence not to pass on information to the police about a future act of terrorism or about people involved in terrorism occurring in the United Kingdom and connected with Northern Ireland affairs. 'Terrorism' is defined as the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

A person who has information which he knows or believes might be of material assistance

- (i) in preventing an act of terrorism; or
- (ii) in catching, prosecuting or convicting a person involved in terrorism commits offences if he fails to pass on the information to the police (unless he had a reasonable excuse not to do so). (In Northern Ireland the information can be passed on to a member of the Armed Forces.)

Maximum penalties: on conviction in the magistrates' court, a fine of £1000 and/or six months imprisonment, or if the case is heard in the Crown Court, an unlimited fine and/or five years imprisonment.

A person can be charged in any place he has visited since the time that he obtained the information.

The police can arrest anyone without a warrant they reasonably suspect of an offence under this section.

The case against section 11

This section represents a dangerous innovation and in conjunction with the police powers of arrest and detention could lead to suspects giving false and misleading information to obtain an early release from police custody.

Under the Emergency Provisions Act, the Army and police have the right to question an individual as to his or her knowledge of any recent terrorist event and failure to answer 'to the best of one's ability' can result in a maximum sentence of six months imprisonment and/or a fine of £100. The power has been widely abused by the Army to carry out the collection of low-level intelligence and census information-gathering, enabling the Army to boast knowledge of wallpaper colouring of every house in certain areas of Belfast! Such information has been used to intern suspects, and of course, under this Act could form part of the exclusion dossier presented to the Secretary of State.

The section is so vague that it is impossible to know whether or not an offence has been committed under it. The NCCL firmly believes in the right of a suspect to know the nature of the suspicion which forms the basis of his arrest. The section gives the police the right to arrest a person on the basis of 'reasonable suspicion that they possess information on terrorism'. In practice it is impossible to challenge the nature of this 'reasonable suspicion' and section 11 therefore legitimises fishing-trips by the police to obtain information from people who are not themselves suspected of involvement in terrorism.

The government have justified changes in court procedure in Northern Ireland alleging that potential witnesses were afraid to disclose information about terrorist activity. By creating an offence for non-disclosure many potential witnesses may be pushed into a dangerous and irreconcilable dilemma. As Gerry Fitt MP put it 'his information would be evidence and he would have to appear in court. Moreover he would be a witness for the prosecution and his name and address would probably be made known . . . If they (the terrorists) did not take the informant's life, they could easily intimidate him by attacking his family'.

The NCCL believes that this section has not in practice enabled the police to bring to court the people involved in terrorist activities who would otherwise have gone free. Despite Lord Shackleton's recommendations, the Home Secretary has succumbed to pressure from the police who are clearly delighted that it has now become a criminal offence for a person not to talk to them.

Conclusions

The Prevention of Terrorism Acts have severely undermined the principles of natural justice and the rule of law. Their provisions violate international standards on human rights — standards accepted by the British Government itself. The following points summarise the most disturbing effects of the Acts.

1. By giving the Home Secretary the power to authorise detention for up to seven days without access to a court, the Act has destroyed *habeas corpus* as a safeguard against unlawful detention.
2. The Act authorises detention for questioning. A detainee need not be suspected of any specific offence: arrest and detention can be based on 'reasonable' suspicion of involvement in 'terrorism' generally. For detention at ports of entry — where the majority occur — the suspicion need not even be 'reasonable'.
3. The power to exclude a United Kingdom citizen from one part of the country to another has given the Home Secretary the right to impose arbitrary, executive punishment on the basis of secret evidence. The suspect has no right to know or challenge the evidence against him and no right to a court hearing. The exclusion order provision is probably a breach of the European Human Rights Convention (which guarantees the right to a fair hearing); furthermore, its continued existence makes it impossible for the United Kingdom to ratify Protocol 4 of the Convention (which protects the right of citizens to freedom of movement within their own country).
4. The power to ban organisations by executive decision, coupled with vague provisions about support for proscribed organisations or for terrorism generally, severely undermine freedom of association and freedom to express views which conflict with Government policy.

Like the Special Powers Acts, the Prevention of Terrorism Act means that 'individual liberty is no longer protected by law, but is at the arbitrary disposition of the Executive'. Protests from the United Kingdom about human rights violations abroad come ill from a government which demands such excessive powers for itself. The United Kingdom Government and the British press and large sections of the British public condemned the Soviet Government's 'internal exile' of Sakharov and other dissidents. But a system of internal exile is precisely what the Prevention of Terrorism Act has created for the United Kingdom.

3. Excerpts from a Report by Lord Tony Gifford
entitled Supergrasses: The Use of Accomplice
Evidence in Northern Ireland:

Introduction

1. I was asked by the Cobden Trust to undertake an investigation with the following terms of reference:

- i. Whether and in what circumstances the interests of justice can be served by the uncorroborated evidence of accomplices in criminal trials in the United Kingdom.
- ii. What particular considerations arise from the use of such evidence in non-jury trials in Northern Ireland.
- iii. What consequences may the keeping of such accomplices and their families in protective custody have for their interests and the interests of justice generally.

6. In this report I frequently use the term 'supergrass' to denote a person who has repeatedly taken part in serious criminal enterprises, and who agrees to give evidence for the prosecution against alleged participants in those same crimes. The word has now become widely used, and there is no other word with the same meaning. 'Accomplice' is a wider term covering anyone who has taken part in a crime. 'Informer' is more appropriate to describe those who have been working on behalf of the police at the time that crimes which they describe have been committed. 'Converted terrorist' may be a suitable term to describe a person who has genuinely repented, but not a person who undergoes a 'conversion' for the sole purpose of obtaining immunity and avoiding a long prison sentence.

Note: This Report was sponsored by the Cobden Trust of London, England:

The Cobden Trust is a registered charity established in 1963 to undertake research and education work in the field of civil liberties. It seeks the protection and extension of civil liberties in the United Kingdom and has a two fold strategy to achieve this: research, into the causes of injustice, and education work, informing the public about their rights and responsibilities.

The Growth of Supergrasses

24. On 21 November 1981 Christopher Black was arrested in North Belfast. After two days of silence, he began to make the first of a large number of statements implicating himself and other people in IRA crimes. On 24 November 1981 he was granted immunity from prosecution. Thirty eight people were charged on the basis of this information. After a trial lasting from December 1982 to August 1983, 35 were convicted.

25. By then, the use of supergrasses, against alleged offenders of both Republican and Loyalist persuasion, had been extended dramatically. In the table below, I have attempted to list the numbers involved from all the information known to me. The list may well be incomplete, as I have heard mention of other names which I could not verify. In some cases there is an overlap, when the same people have been named by a number of different supergrasses. I believe the total number of 446 people to be a fair estimate of the numbers who so far have been charged on the basis of supergrass information.

Supergrasses in Northern Ireland 1981-3

<i>Name</i>	<i>Alleged Group</i>	<i>Immunity?</i>	<i>Number Charged</i>
<i>A. Completed Trials</i>			
Christopher Black	IRA	Yes	38
Joseph Bennett	UVF	Yes	16
Kevin McGrady	IRA	No	10
John Grimley	INLA	Yes	22
<i>Statements Retracted</i>			
James O'Rawe	IRA	Yes	6
Clifford McKeown	UVF	Yes	29
Walter McCrory	IRA	?	5
Robert Brown	IRA	?	5
Sean Mallon	INLA	Yes	3
Jackie Goodman	INLA	Yes	36
John McConkey	IRA	No	28
Robert McAllister	INLA	?	13
Robert Lean	IRA	Yes	28
Patrick McGurk	IRA	Yes	8
William Skelly	IRA	No	10
Charles Dillon	IRA	No	7
<i>C. Cases Pending</i>			
Raymond Gilmour	IRA	Yes	45
Robert Quigley	IRA	Yes	20
James Williamson	UDA	Yes	8
Harry Kirkpatrick	INLA	No	38
John Gibson	UVF	No	19
John Morgan	IRA	Yes	7
William Allen	UVF	No	22
Stanley Smith	UDA	No	12
James Crockard	UVF	No	11

The Law in Northern Ireland

21. The general law on the use of accomplice evidence is the same in Northern Ireland as in England. What is different is the method of trial. All 'scheduled offences', which include all serious offences of violence unless the Attorney General certifies to the contrary, must be tried by a judge sitting alone without a jury. Whenever a person is convicted, the judge is required to give a judgment stating the reasons for conviction.

22. The normal procedure with scheduled offences is that there is a preliminary enquiry before a magistrates court. The defence has the right to require any prosecution witness and to give oral evidence and be cross-examined at the preliminary enquiry. This procedure can be circumvented by the use of the Voluntary Bill of Indictment procedure, by which the prosecution, either with the approval of the Attorney General, or with the leave of the court, may commit the accused for a trial without a preliminary enquiry. This procedure has been used in two supergrass cases.

23. While awaiting trial, the majority of people accused of scheduled offences are remanded in custody. Bail is only available if the judge is satisfied that the accused will comply with his bail conditions, will not interfere with any witness and will not commit any offence while on bail. In practice, accused people spend long periods in custody awaiting trial. The delays, in the supergrass cases which have so far reached the trial court, are set out in the following table:

<i>Name of Supergrass</i>	<i>Date of Arrests</i>	<i>Start of Trial</i>	<i>End of Trial</i>	<i>Time of Remand</i>
Black	11/81	12/82	8/83	21 months
Bennett	5/82	2/83	3/83	10 months
McGrady	6/82	5/83	10/83	16 months
McGurk	2/82	10/83	10/83	20 months
Grimley	2/82	9/83	11/83	21 months

The Black Case

44. The dimensions of the Black trial were extraordinary. Thirty-eight defendants were on trial in one dock, or rather seated in rows around three sides of one courtroom. The indictment contained 184 charges, based on 45 separate incidents. The trial lasted from December 1982 to August 1983, occupying 120 court sitting days. The evidence of over 550 witnesses was either called or read out. The principal evidence and in many cases the only evidence against 37 of the defendants came from Christopher Black, who was in the witness box for 15 successive sitting days. At the conclusion, in a judgment which took three days to read, 35 of the defendants were convicted.

47. Black himself was 28 years old, married with four children. He said that he was in the IRA for a short time in 1975, until he was arrested for an attempted robbery in December 1975, for which he was sentenced to ten years imprisonment. After his release in December 1980, he rejoined the IRA and was, according to his evidence, actively involved until 21 November 1981, when he was arrested while engaged in an IRA propaganda exercise. He had committed perjury during a trial in 1975 in order to substantiate a false alibi. He was described by the judge as an 'active and wholehearted' member of the IRA, 'up to his neck in terrorist activity throughout 1981'. He played a major role in nearly all of the incidents. He shot to kill. He was a 'dangerous and ruthless terrorist'. After his arrest on 21 November 1981, he was silent for two days, but during the evening of 23 November, according to the police, he began to ask what the police could offer him, saying 'if I help you will you help me?'. The judge found that the police did not give him any promises, but gave him some hope by setting out the different ways in which the authorities might deal with him if he turned Queen's evidence. Then, said the police, he dictated a number of statements between 11.30 pm and 7.00 am on the night of 23/24 November. His compelling motive was, said the judge, that 'he could not face going back to prison and he believed his only chance to escape that was to pass information and give evidence'. On 24 November 1981 he was offered immunity from prosecution.

49. Many people have commented to me on the circumstances in which Black's evidence was heard before the trial judge, Mr Justice Kelly, and on the way in which that evidence was given. The witness box was close to the bench and slightly to one side of it. Black sat directly facing the judge, speaking directly to him, never turning away. In front of the witness, between Black and the rest of the court, stood two police officers. The effect was that even the barristers who were cross-examining Black could not properly see his face. To those who watched, there appeared to be an intimate rapport between Black and the judge. (A wholly contrasting atmosphere was observed in the McGrady trial, continuing at the same time before the Lord Chief Justice, who treated the supergrass with coldness and at times hostility).

52. My second worry is that there must have been wrongful convictions at least of people on the fringes. Reading the indictment, and Black's statements, it is noteworthy that only a few people figure regularly in his story. One defendant was charged on 84 counts, another on 69, another on 45. But 28 out of the 38 accused were charged on less than five counts, and were allegedly involved in one or two incidents only. Lawyers to whom I spoke were very concerned that innocent people who were named by Black had no real means of disputing their guilt. One man implicated in only one incident was not named by Black in any of his statements until after nine months protective custody. Black admitted that he and this man had formed an instant dislike for each other. Yet he was convicted. Another man called 40 alibi witnesses to prove that he could not have been on a training course where Black had placed him; but their evidence was not accepted. The problem was that if Black was shown to be embroidering his evidence, or inserting wrong names, or simply unreliable, about any one defendant, his unshakable credibility, which was the sheet anchor of the judge's decision, would be undermined.

30. The principal arguments against the use of supergrass evidence are:

- i. There are so many motives which might induce the supergrass to tell lies that nothing which he says can be considered reliable, at least unless corroborated by independent testimony.
- ii. In particular, false evidence by supergrasses has been generated by the police inducing the supergrass to implicate those whom the police believe to be guilty, irrespective of whether the witness has personal knowledge that they have committed crimes.
- iii. The spectacle of hardened criminals, including multiple murderers, receiving immunity from prosecution and large sums of money is offensive.
- iv. The judges sitting alone are incapable of making a correct assessment of this evidence, and have in practice believed supergrasses in the face of overwhelming evidence of their unreliability.
- v. In practice many innocent people have been convicted; even if some are guilty, it is counter-productive to secure their conviction by means of a discreditable form of evidence.

Conclusions

95. For all the reasons which I have described, the use of supergrass evidence can lead, and I believe has led, to the telling of lies and to the conviction of the innocent. There is in addition a further social harm, which is the discrediting of the judicial institutions in the eyes of the community. In the aftermath of the appalling murders at Dartley Church, I am well aware of the need to combat terrorism; but one does not combat terrorism effectively by twisting the course of justice. I believe that the supergrass trials have already caused a dangerous anger and alienation among a broad section of both Protestant and Catholic populations.

96. My investigation has focused on the Diplock non-jury courts. The problem would not be as grave if the truth were being determined by a jury. The experience of supergrass trials adds considerable weight to the arguments for re-establishing trial by jury for all indictable offences in Northern Ireland. I believe myself that trial by jury should be restored, possibly with some particular arrangements to ensure the security and anonymity of jury members. If that were done, then I would not consider that any special measures need at present to be taken to deal with supergrass evidence. I would expect juries to appreciate the dangers of which the judge would be required to warn them. That would be the most effective means of doing justice.

101. First, the Director of Public Prosecutions, under the authority of the Attorney General, has the responsibility for the conduct of prosecutions in terrorist cases. He has a duty not to prosecute on the basis of evidence which is not credible. He has the power to refuse to prosecute cases which depend on uncorroborated supergrass evidence, as his English counterpart has done for many years. *I recommend that prosecutions should not be authorised by the DPP where the only evidence to implicate the accused is that of a supergrass.* The Attorney General has the power to insist that such a policy be adopted, and if the DPP will not himself take action the Attorney General should intervene to prevent prosecutions based on uncorroborated supergrass evidence.

102. Secondly, the judiciary have a huge and burdensome responsibility. Even though they may find themselves inclined to believe the testimony of supergrasses, they should adopt the standard of Mr Justice Murray in the McCormick case. *When the evidence of a supergrass is uncorroborated, they should hold that it is highly dangerous and wrong to convict. When sitting in the Court of Appeal, they should follow the same standard, and examine very carefully whether the convictions which have been recorded are safe and satisfactory.* For if they are not, the Court of Appeal has the duty to quash the convictions.

103. However, if none of these things happen, the ultimate remedy is with Parliament. Parliament has legislated for an exceptional form of trial procedure in Northern Ireland, dispensing with the most important protection for the innocent in our judicial system. *Parliament should also legislate to provide safeguards for the Diplock system, by a simple measure which provides that in a Diplock court there must as a matter of law be corroboration of the evidence of an accomplice.*

4. Excerpts from Walsh, D.P.J., The Use and Abuse of Emergency Legislation in Northern Ireland (1983):

INTRODUCTION

Background to the Current Conflict:

THE NORTHERN IRELAND PROBLEM

Any attempt to explain in detail the roots and nature of the Northern Ireland conflict would necessarily be lengthy and complex. For the purpose of this study only the briefest of outlines is necessary. Today, broadly speaking, the Northern Irish population is split into two hostile groups: the loyalists, who are largely Protestant, wish to maintain the link with Britain; and the republicans, who are largely Catholic, wish to separate from Britain and re-join with the rest of Ireland. It is primarily this conflict of national identity which is at the source of the cleavage between the two communities.

The two parts of Ireland were separated back in 1921 as a by-product of the British government's attempts to return some form of autonomy to the country as a whole. The wish of the majority was for independence from Britain but this was resisted by the Protestant minority in the North-East. They feared the loss of their power and status and perhaps their religious liberty in a predominantly Catholic, independent Ireland. The British response to this, in the Government of Ireland Act 1920, was to create two devolved Irish parliaments: one for the Catholic south which consisted of 26 counties, and one for the Protestant north which consisted of six counties. In practice, only the northern parliament, or Stormont as it was called, became a reality as the rest of Ireland went its own way towards independence. By 1925, the border between Northern Ireland and the Republic of Ireland (as it is now known) became settled.

The consequences of the creation of this statelet under its own devolved government have a very direct bearing on events today. Within its boundaries were the two hostile communities already referred to. Now, however, the Protestants were in the majority and had their own devolved government while the Catholics constituted a very sizeable minority. Despite their majority, the Protestants felt themselves anything but secure. Their only land border was with the rest of Ireland which refused to recognise the legitimacy of the Northern statelet. Added to this, was the presence within their boundaries of a large Catholic population who felt no allegiance to the Northern statelet and shared the desire of their fellow countrymen in the rest of Ireland for the removal of the northern border. Fear of attack from within and outside, therefore, was a constant preoccupation for the northern Protestant.

Immediate Causes of the Current Conflict:

THE STORMONT RESPONSE

Their response was to make their position as secure as possible. A vital element here, of course, was the link with Britain which they still cherish today for this very reason. But perhaps even more important was the Stormont government. Although designed on the Westminster model of democracy the Westminster style of democratic politics was never practised within it. Right from the start, the polarisation of the two communities ensured that the electorate voted first and foremost on a religious and constitutional basis; i.e. the Protestant voted loyalist or unionist while the Catholic voted republican. Given the inbuilt Protestant majority this inevitably meant that the loyalists were assured of a permanent majority. Indeed, from Stormont's creation to its demise in 1972, the loyalists occupied the seat of government without a break. They used this position of power to make their situation even more impregnable. They organised an armed police force, the Royal Ulster Constabulary (RUC) with a paramilitary wing, the B-Specials, whose particular role was to protect the state against internal and external attack. Draconian emergency legislation in the form of the Special Powers Act (Northern Ireland) 1922-33 was enacted. This conferred extensive powers on the Minister of Home Affairs and the police. Finally, they designed the local government electoral system to ensure that loyalist representatives were in the majority in council areas where, numerically they were in the minority.

These measures only served to increase the alienation and frustration of the Catholic minority who further felt that they were being discriminated against in jobs and housing.² Inevitably, perhaps, there was some violent reaction. Prior to 1969, however, this consisted of a few ill-organised, poorly supported attempts at overthrowing the state by armed insurrection. At no time did they ever pose any real threat to the authorities. Nevertheless, the response of the Stormont government was invariably severe and militarily oriented. The Special Powers legislation was put into operation and hundreds of suspects were interned without trial. The paramilitary B-Specials were mobilised.

In the 1960s, Catholic opposition began to express itself in the form of public demonstrations, or civil rights marches as they were called. These provoked a hostile reaction from sections of the Protestant population which usually expressed itself in sectarian rioting. The Stormont government reacted by clamping down severely on the marches, using the police and B-Specials to break them up by force. These measures, along with the failure to protect Catholic communities from sectarian attack, plunged the relationship between the Catholic population and the government, and in particular the RUC, to an all-time low. As the violence and rioting escalated in both volume and frequency, the RUC, having lost the confidence of the Catholic community, found itself unable to cope and ultimately the British army was called in to play a peace-keeping role.

Under pressure from Westminster the Stormont government ameliorated their approach. The RUC was re-organised and disarmed,³ the B-Specials were abolished, ombudsmen were appointed,⁴ local government franchise was reformed and the power and status of local councils was downgraded in an attempt to meet some of the grievances of the Catholic community. These attempts at reform, however, failed to have the desired effect in practice owing to the opposition of hardline loyalists and a feeling among the Catholic community that they were too little too late. Meanwhile, trouble was brewing over the use of the army in a peace-keeping role in Catholic areas. It was originally deployed in this manner owing to the unacceptability of the RUC in these areas. The army, however, was inherently unsuitable for fulfilling a police, peace-keeping role and a series of operational blunders such as the Falls curfew in 1970, plunged the relationship between the Catholic community and the soldiers into one of open hostility. As the situation deteriorated the Provisional IRA, which had originally been formed to protect Catholic areas from attack, went on the offensive. Their object was to force the withdrawal of British troops from Northern Ireland and the creation of a 32 county Irish Republic.

The Stormont government quickly reverted to its traditional, hard-line military approach. The RUC was re-armed, the Special Powers legislation was again put into action, internment without trial was re-introduced and the army was given a dominant, positive, peace-keeping role in Catholic areas. This policy resulted in frequent, large-scale searches of homes and persons in republican areas, the arrest, interrogation and detention without trial of large numbers of people⁵ and the use of rubber bullets against rioters. Ultimately, the authorities resorted to real bullets, the most notorious example being the shooting dead of 13 Catholics taking part in a civil rights march in Derry in 1972. Even the interrogation techniques used on those detained was indicative of the harsh, military approach of the Stormont government: in 1977 they were denounced as amounting to torture and as inhuman and degrading treatment by the European Commission on Human Rights in a case brought by Ireland against the United Kingdom government.⁶

So far from stemming the rising tide of violence this military approach, coupled with the lack of any serious political initiative had the effect of driving many of the Catholic population into the IRA camp. Violence escalated unabated and 'no-go' areas sprang up in republican districts from which the army and the RUC were effectively excluded. Peace and stability were becoming more and more remote.

THE BRITISH RESPONSE

The British government felt it had to intervene and, in 1972, the Stormont government was dissolved and control over the day-to-day running of Northern Ireland reverted to Westminster. The British approach can be divided into two periods: 1972-75 and 1975-present day. The first stage consisted of a mixture of the Stormont military strategy coupled with an attempt to harness the judicial process for use in the front line alongside the military process. There was a growing realisation in Westminster that the iron fist tactics of the Stormont government coupled with a lack of any serious political initiative might well be provoking more violence than it was preventing. Consequently, the government's aim was to reduce the emphasis on provocative military measures and increase use of the judicial process. This was to be coupled with, or followed up by, a major political initiative which would be the first recognisable attempt to come to grips with the roots of the Northern Ireland problem.

The first step in this direction was a realignment of the internment process in 1972. Instead of a suspect being interned at the mere diktat or say-so of the Secretary of State, a system of judicial hearings was introduced. These were by no means the equivalent of an ordinary trial but they did create the impression that the suspect had in some way been found guilty of an offence before he was locked up. Even the provocative title of *internment* was abolished and replaced by *detention*.⁷

These measures were largely accepted and incorporated into the Northern Ireland (Emergency Provisions) Act 1973. The British government also took this opportunity to repeal the controversial special powers legislation. It was a repeal in name only, however, as the 1973 Act also conferred wide powers of arrest on the RUC and included the detention without trial provisions described earlier. In fact, in many ways the 1973 Act represented a retrograde step as far as the rights of the citizen are concerned. It put the authorities in the position where they could represent themselves as using the 'normal' judicial procedures when, in fact, the procedures they were using consisted of special powers of arrest, non-jury 'Diplock' courts and special rules of evidence. Furthermore, when these measures proved insufficient in any particular case they could resort to detention without trial which was thinly disguised as a civil, as opposed to military, procedure. Overall, therefore, the Westminster strategy between 1972 and 1975 could be described as a mixture of the military and judicial approaches.

It is worth pointing out at this stage that it is doubtful if the British government envisaged these measures operating on a long term basis. In 1973 it embarked on a political initiative aimed at tackling the roots of the problem in Northern Ireland.⁸ That initiative purported to recognise the dual national identities

prevailing in Northern Ireland by proposing the establishment of a Council of Ireland. It also sought to give the Catholic minority a say in the government of the state for the first time by setting up the power-sharing assembly. Due to loyalist opposition, however, the Council of Ireland never got off the ground and the power-sharing assembly only lasted a number of months. It would seem reasonable, however, to view the security measures of the time in the context of the government believing that the political initiative would actually succeed. The government's hope would have been that the success of the initiative would gradually undermine support for violence. The special powers of arrest, non-jury courts and detention without trial would be able to mop up any pockets of resistance. Gradually, as peace and stability returned, these special measures, beginning with the detention process, could be systematically phased out and a return made to the normal rule of law. These hopes of an early end to the violence were dashed with the collapse of the initiative and so the special security measures were allowed to continue.

"Criminalization": Britain Tries to Solve Its Problem by Re-Labeling Them:

The collapse of the political initiative meant that a re-think on security strategy was needed. An early cessation of the violence could no longer be taken for granted. It was at this time that a committee was set up, under the chairmanship of Lord Gardiner, to review the working of the emergency legislation in the context of the protection of human rights.¹⁰ Although the Gardiner report paid lip service to the desirability of removing the emergency legislation at the earliest opportunity the tenor of its recommendations was aimed more at institutionalising many aspects of it.

Government policy on security since then has been heavily influenced by the Gardiner recommendations. It can be summed up in one word: 'normalisation'. This refers to the overall strategy of downgrading the status of the violence in Northern Ireland from that of a 'war' to mere criminal activity. Accordingly, those taking part would be branded as criminals or terrorists and would not be able to justify their activities as acts of war. But to promote this downgrading process it would be necessary for the authorities to desist from using military methods and rely exclusively on the police and the courts to deal with the violence.

Some steps were taken in this direction. In 1975 a policy decision was taken not to resort to detention without trial. Instead, the Diplock Courts were relied on to deal with terrorist suspects. In fact, the detention process has not been used since then, although it has not been removed from the statute book. In 1976 the practice of granting 'political status' to persons interned or detained without trial or 'special category status' to those convicted in

Diplock courts was phased out. Thus, from 1976 onwards, anyone convicted in the Diplock courts was treated in exactly the same way as ordinary criminals. Finally it was decided to decrease the strength of the army on the ground and to replace them with the RUC and UDR. The intent behind this at least as far as the use of the RUC was concerned, was to create an image of normality on the ground. The theory was that a uniformed policeman was much less likely to attract as much attention or provoke a hostile reaction as a fully equipped soldier. No steps were taken, however, to disarm them or put them back on beat patrol instead of patrolling in the military type Land Rover.

Some Effects of the "Criminalization" Policy:

This criminalising process, then, consisted of being seen to rely almost exclusively on the ordinary criminal process, as amended by the emergency legislation, to deal with the violence. There are certain dangers, however, inherent in this strategy. First, there is the risk that attention will be diverted away from the essentially political nature of the problem. By branding the violence as a mere upsurge in criminal activity, attention will be focused on adjusting the criminal process to cope with it rather than trying to hammer out a political initiative which might solve the problem. Accordingly, a certain level of violence and a reactionary criminal process will become accepted as the norm. Secondly, and closely related to this, is the danger that the extensive police powers and the minimal protection for the accused in the courts will become the norm not only for dealing with the political violence but also for ordinary crime. In this way, the harsh emergency measures will become institutionalised as part of the normal process. Thirdly, there is the question of controlling the exercise of these extra powers. Because they are framed so broadly, the borderline between a legitimate and oppressive exercise of them will be very difficult to define. Finally, those sections of the community which suffer at the hands of the emergency measures will become disillusioned with, and alienated from, the whole system of administration of justice.

Today the legal framework of the 'emergency' criminal process is contained largely in the Northern Ireland (Emergency Provisions) Act 1978 and the Prevention of Terrorism (Temporary Provisions) Act 1976. Despite the dangers outlined above the British government has not carried out a comprehensive analysis or review of this apparatus, or its predecessor, since 1975. Its operation throughout the 1970s has however been monitored by independent observers.¹¹ Their research has revealed serious abuses right across the whole spectrum of the administration of justice system. These have varied in nature and intensity throughout the 1970s. For example: in the early part of the decade there was the discriminatory use of internment and oppressive army activities in republican areas; in the mid-1970s a 'shoot on sight' policy appeared to be operating and in the late 1970s suspects were being convicted in the Diplock courts on the basis of confessions obtained by dubious police interrogation practices.

The changing nature of the abuses and, indeed, the fact that there are abuses and that these have been continuing now for 14 years, highlights the necessity for constant vigilance and continuous monitoring of the emergency legislation. Identifying the abuses will not, in itself, result in their cessation but at least it will facilitate a more informed assessment of the value and dangers in using the criminal process to deal with political violence. This current study is an attempt to carry the previous research into the 1980s. In particular it will assess the extent to which the abuses of the 1970s are still a feature in the 1980s and will aim to identify new developments. It is hoped that by building on the previous research some overall conclusion can be reached on the implications of relying on the criminal process to conquer Northern Ireland's fundamental problem.

The Use and Abuse of Arrest Powers:

Section 11 of the EPA

Under section 11(1) any constable may arrest without warrant any person whom he suspects of being a terrorist. A terrorist is defined in section 28(1) as 'a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purposes of terrorism'. Terrorism, in turn, is defined as 'the use of violence for the purpose of putting the public or any section of the public in fear'. Under sections 11(3) and 11(4) the arrested person can be detained for up to 72 hours without being charged and can be photographed and fingerprinted on the orders of an officer of the RUC not below the rank of chief inspector.

The first thing to be noted about this power of arrest is that there is no requirement that the suspicion be reasonable. It will be sufficient if the arresting constable suspects. In interpreting similar wording in the regulations made under the Special Powers Act, Mr Justice McGonigal said that:

'the court can only enquire into the existence of the suspicion in the mind of the constable and whether the suspicion was an honest one.'¹¹

So, if the arresting constable honestly suspects the individual, no matter how unreasonable, then the arrest will still be valid.

Table 3: The Number of Arrests and Persons Charged Under the Prevention of Terrorism (Temporary Provisions) Act 1976 in Northern Ireland

Period	No of Arrests	No of Persons Charged	Average Arrests p.a.	Proportions of Persons Charged
November 1974 — March 1979	590	290	137	49%
April 1979 — December 1980	365	144	208	40%
January 1981 — December 1981	495	158	495	32%

Table 4: The Numbers and Proportions of those Arrested Under the Prevention of Terrorism (Temporary Provisions) Act 1976 and not Charged who are Held for Various Periods in Northern Ireland

Period	Up to 3 days	3 to 5 days	6 to 7 days
1979	39 35%	24 22%	48 43%
1980	39 33%	33 28%	45 38%
1981	85 25%	96 29%	156 46%

Indeed, when the arrest figures in the court survey were examined in greater detail it was found that emergency powers were being used in many situations where the ordinary law would have been more appropriate. In 67 cases the arrest was carried out elsewhere than at the suspect's home (i.e. in circumstances where it was more likely that the police would have sufficient knowledge to use ordinary powers of arrest). In 52 of these it was known which power they actually used, as were the surrounding circumstances. In almost 80 per cent of these they used their emergency powers where it seemed that the common law would have been more relevant. In the other 20 per cent they did in fact use their ordinary power.

The reasons for the police opting to use their emergency powers of arrest are readily understandable. They allow them to hold a suspect for a much longer period of time; to question him on a much broader range of matters; they free them from the more stringent legal requirements of an ordinary arrest and presumably make it easier for them to extract a confession from the suspect. The legality and the implications of the practice, however, are another matter. While there may be some legal justification for using the section 12(1)(b) power where the intention ultimately is to bring the suspect before the court, the same can hardly be claimed for section 11 of the EPA. It was designed not for such purposes but for facilitating the detention without trial process, a totally different concept. Indeed, parliament provided section 13 in the same Act for the purpose of bringing suspects before the court. It, however, was not used in one single case in the court survey.

Channelling Suspects Through the Courts

Since the majority of arrests in the court survey were carried out under section 11 it must be said that this power is being used for a purpose for which it was not intended. The implication of this abuse for the accused is that he is denied the protections that Parliament intended he should have under section 13, namely: to be brought before a magistrate or released within 48 hours and to be told the nature of the crime of which he is suspected. Although, according to *In re McElduff*²⁴ the suspect is entitled to be told the general nature of the offence of which he is suspected when arrested under a section 11 type power, in practice he never is. To this extent the *ex parte Lynch*²⁵ interpretation of section 12(1)(b) of the PTA appears to be applied to section 11 although, in theory, they are two totally different arrest powers. While abusing section 11 in this manner makes the police task much easier, it represents a fundamental shift in the protections afforded to the suspect in the criminal process. The same incidentally can be said of section 12(1)(b) although its use here is *prima facie* legal. Employing them in this context confers a significant advantage on the prosecution in the criminal trial. They allow the individual to be dragged into the criminal process without his even knowing what offence he is supposed to have committed. And considerable pressures can be brought to bear on him to make a confession not only by virtue of the length of periods for which he can be held, but also, as will be seen later, by oppressive interrogation practices which are permitted by the emergency legislation. The effect of this, inevitably, is to bring the whole criminal process from the police to the courts into disrepute, at least among those sections of the community most affected.

Intelligence Gathering

The emergency powers of arrest are used not only for the purpose of channelling suspects through the courts. Ninety per cent of all those arrested under the emergency legislation in the first 10 months of 1980 were not charged at all; they were interrogated and released without charge. As noted earlier, this compares with a figure of 10-20 per cent in Britain. What is the explanation for this? It will be seen later though from the interview survey (which focused on this 90 per cent) that the objective is intelligence gathering and surveillance. It is also worth pointing out here that the line between intelligence gathering, surveillance and mere harassment is very thin. Since about 50 per cent of arrests in the interview survey were made under section 11 of the EPA it would seem that these purposes constitute one of its primary functions. Again, given the context of section 11 in the EPA the legality of its use for such purposes is highly questionable. Section 12(1)(b) of the PTA only appeared in about 10 per cent of cases in the interview survey. The latest official figures (see tables 3 and 4), however, suggest that its use is increasing in this context. Like section 11 it would appear, as will be seen later, that it is being used for intelligence gathering surveillance and harassment. In the case of section 12(1)(b), however, it is much more difficult to attack the legality of its use in this context.

The Arrest Operation

The arrest operation, whether carried out by the army or the police, normally begins with an early morning visit to the suspect's home. In the court survey, twice as many arrests were made at the suspect's home as were made out on the street (see table 2). A similar picture emerged in the interview survey. This unusual ratio suggests that most of the arrests were carefully pre-planned operations in which the police knew the identity of the person they wanted to interview. That their suspicion of the individual's involvement in terrorism was not always so certain will be seen later in the interrogation section. There was no apparent difference here between loyalist and republican cases although terrorist and ordinary criminal suspects did seem to be treated differently. As will be revealed later, about 40 per cent of all cases in the court survey, many of which began with an arrest under the emergency legislation, concerned an ordinary criminal as opposed to a politically motivated or terrorist offence. The arrest operation in these cases was twice as likely to be effected on the street in the vicinity of an alleged offence than was the case with the terrorist (see table 2). This tendency to follow the normal practice in the criminal cases suggests that the practice of arresting a suspect at his home is primarily a feature of the RUC's strategy for fighting terrorism, although it is also starting to be used in the ordinary criminal cases.

The time at which arrests are made is also most significant. Under normal circumstances the hours on either side of midnight are usually the busiest in arrest terms.²⁰ Yet in the court survey 46 per cent of arrests were made between 4am and 8am (see table 5); and 87 per cent of arrests made at the suspect's home were carried out at this time (see table 6). The same picture emerged in the interview survey. Again this demonstrates that the RUC emergency arrests are usually carefully pre-planned operations where the identity and abode of the wanted person is known. The advantage in arresting the suspect at this time is that he will be at his most vulnerable point. He will be shaken and disorientated after being awakened out of his sleep and transported to the alien environment of Castlereagh or Gough detention cells. In this state he will be less able psychologically to withstand the pressures of an interrogation and so may prove more helpful to the RUC in its investigations.

The process of obtaining confessions:

Confession

The primary purpose of the interrogation in the court survey appeared to be obtaining a confession. Broadly speaking, two approaches can be identified depending on how much incriminating information the detectives had against the suspect. In one group of cases the police clearly suspected the individual of being involved in a particular offence, either because they caught him in the act, behaving suspiciously in the immediate vicinity or as a result of information passed on to them from others. In these cases the interrogation would normally begin with the detectives asking the suspect what he knew about the incident. Sometimes this produced an immediate confession. Where it did not the detectives persisted in their questioning on the suspect's involvement. This would usually be interspersed with totally unrelated questions on the suspect's personal life, his family and his interests. The aim here is to encourage him to relax and drop his guard in the hope that when they return to the incident by firing a question at him out of the blue he will be caught so unawares that he will give an incriminating or inconsistent answer. In the 20 per cent of cases in the court survey where the police did not appear to suspect the accused of a particular offence from the outset the approach was slightly different. The interrogation would begin with general questioning on the latest activities and personalities in the suspect's area. The detectives would ask him all he knew about them and suggest that they had information implicating him in some of these activities. In support of their accusations they would usually be able to produce photographs depicting the suspect in the company of other suspects or attending a paramilitary funeral or they would be able to relate some of his recent movements. Again this would be interspersed with questions about his personal life, interests and members of his family. The effect of these techniques plus the practices outlined earlier is to undermine the confidence of the accused and his will to resist the suggestions of the detectives. If he happens to make an admission to any particular offence then the questioning will focus in on this.

Some aspects of these interrogation practices, however, would almost certainly result in a confession being declared inadmissible at common law on the grounds of involuntariness. Unfortunately for the accused under the more stringent test provided by section 8 they would not.

Table 14: Nature of Confession (Court Survey)

	Written		Oral		None		Not Known	Total	
Loyalist	61	87%	3	4%	6	9%	0	70	41%
Republican	67	74%	11	12%	12	13%	0	90	53%
Security Forces	6	86%	0		1	14%	0	7	4%
Other	1	100%	0		0		0	1	1%
Not Known	2	100%	0		0		0	2	1%
Total	137	80%	14	8%	19	12%	0	170	
Terrorist	74	73%	12	12%	15	15%		101	59%
Non-Terrorist	63	91%	2	3%	4	6%		69	41%
Not Known	0		0		0			0	
Total	137	81%	14	8%	19	11%		170	

How effective have these techniques been in securing confessions? In the court survey confessions had been obtained in almost 90 per cent of the cases (see Table 14). Just over 90 per cent of these were in the form of written, signed statements while the other 10 per cent were oral and unsigned.

THE ARMY

Arrest

The fact that the RUC has become more capable of controlling the peculiar law and order problem in parts of Northern Ireland does not mean that the army has become redundant. Officially it remains as a back-up force to the RUC. As has been the case since its introduction in 1969 it operates almost exclusively in republican areas. Two per cent of all arrests in the court survey were carried out by the army while in the interview survey it was 28 per cent. None of these arrests were carried out in loyalist areas. The extent of army activity in republican areas is, nevertheless, under-represented by the number of arrests indicated in the court survey. Between 1 June 1980 and 31 May 1981 the army made 1504 arrests under section 14 of the EPA. Only 418 of these were subsequently transferred into RUC custody.²⁰ Very seldom do any of these cases ever end up in Diplock courts; in the court survey only seven such arrests ended up there. One possible explanation for this is that many of them could have been charged and tried summarily, but that still leaves unexplained the large number of army arrests in which the suspect is not even transferred into the custody of the RUC. The real explanation appears to lie in the claims of the 28 per cent in the interview survey who were arrested by the army under section 14. The vast majority of these individuals claimed that they were not questioned about a specific offence but rather about their personal lives, members of their family, their associates and sometimes their political views. In other words the purpose of the army arrests would appear to be intelligence gathering, surveillance and harassment. Furthermore, the fact that it uses section 14 so often and yet very few such suspects ever appear before Diplock courts suggests that it uses its arrest power for these purposes even more frequently than the RUC. To use section 14 where there is no suspicion of an offence is a flagrant abuse of the power. As was seen earlier it is only available where a specific offence is suspected. Many of these army arrests, therefore, would appear to be totally illegal.

Intelligence Gathering

Most of these arrests consist of an early morning visit to the home of the suspect where he is arrested under section 14 and then taken to an army base, usually Springfield Road joint army/RUC base. There, he is questioned for an hour-and-a-half to two hours by a plain-clothes soldier who will usually have a large file in front of him to which he constantly refers; presumably checking the answers given by the suspect. The questions revolve around the matters mentioned above and only in a small minority of cases will the focus of questioning be a specific offence or incident. After four hours in custody the suspect will be released without charge unless, of course, he is handed over to the RUC which, again, only happens in a minority of cases. The same suspect could experience this two or three times in a twelve-month period. In fact it has become so common in republican parts of Belfast that people accept it as routine. This would appear to be a continuation of the army's screening operations of the early to mid-1970s when they carried out extensive 'stop and question' operations and house searches in order to build up detailed intelligence on individuals and whole communities. The fact that the scale of the screening operations today is considerably reduced is probably because the army is in a position now to be more selective in who it keeps a check on.

Nevertheless, it appears that it still carries out random information gathering exercises, colloquially known as 'census operations'. These consist of foot patrols calling at every house in a particular street and taking down details of the names, addresses, occupations and dates of birth of the occupants. The supposed legal basis of this operation appears to be section 18 of the EPA. This empowers a constable or soldier on duty to stop any individual at random and ask him his name, address, where he is coming from, where he is going to and whether he knows anything about recent shootings or explosions. It is an offence to refuse to stop or fail to answer to the best of one's ability. The wording of the power suggests, however, that it was intended for use in public places such as the street or highway. It is highly unlikely that it covers knocking on someone's door to ask them the relevant questions. It is submitted here, therefore, that in such circumstances an individual could legitimately refuse to answer the questions. It is worth pointing out, however, that the army does use it as a means of intelligence gathering. Equally so, both it and the RUC use it frequently to stop motorists and pedestrians to ask them the relevant questions. In many cases the answers given are recorded and so become another source of intelligence. Indeed in these situations they usually go further and ask an individual's occupation and date of birth although not specifically authorised to do so. It is submitted here that an individual could also legitimately refuse to answer these particular questions.

In many ways, therefore, the army would appear to be duplicating the role of the RUC. Its intelligence gathering operations in the form of 'census taking' goes further than anything the RUC has attempted but, as shall be seen later, its intelligence gathering section 14 interrogations are not all that different from the RUC's. The army also, of course, uses real and plastic bullets, but it does not appear to be any more prominent in this field than the RUC. In fact, when the paramilitary appearance and operations of the RUC and the arrest and interrogation practices of the army are considered together, the distinction between police and army, so obvious in Britain, becomes blurred in Northern Ireland.

A Comparison of Conviction and Acquittal Rates in Diplock vs. Jury Courts:

OUTCOME

Case-hardening

Almost 95 per cent of the cases in the court survey resulted in a guilty verdict to some or all charges (see Table 18). This is very similar to the figure produced by Boyle, Hadden and Hillyard for 1979²⁶ and is also in tune with that for jury trials. What is more interesting is the outcome of fully contested cases. There were 21 of those in the court survey, seven of which resulted in an acquittal to all charges; an acquittal rate of 1:3. Acquittal rate in this context is treated as the ratio of those individuals who were acquitted on all charges to those who pleaded not guilty to all charges; a refusal to recognise the court (there was one in the survey) was treated as an effective guilty plea. The acquittal rate of 1:3 in the 1981 survey compares with an effective acquittal rate of 35 per cent in Boyle, Hadden and Hillyard's 1979 survey and adds further support to their theory of case-hardening of judges in the Diplock courts.²⁷ They base this theory primarily on the declining rate of acquittals in Diplock courts over the years combined with an increasing acquittal rate in jury trials in Northern Ireland over the same years. According to their figures the effective acquittal rate in Diplock courts has declined progressively from 57 per cent in 1973 to 35 per cent in 1976; this figure remained static in their next survey in 1979 while in the 1981 survey it decreased further to 33 per cent. On the other hand, the acquittal rate in jury trials in Northern Ireland increased from 38 per cent in 1974 to 61 per cent in 1977 and remained static at 59 per cent in 1978 and 1979. This would suggest that the Northern Ireland judges have become much more reluctant to acquit in Diplock courts than juries are in jury trials. It should be emphasised here that the same judges sit in both forms of trial.

CONCLUSION

Continuity of Abuse

This study is by no means the first to identify abuse and oppressive practices in the operation of the emergency apparatus. The research carried out by Boyle, Hadden and Hillyard, investigations by Amnesty International, official inquiries set up by the Stormont and British governments, litigation in the European Commission and Court of Human Rights and the activities of community pressure groups and individuals have highlighted continuous, serious abuse in this field throughout the 1970s.¹ The particular contribution of this study is that it confirms that there is still grave cause for concern in the 1980s over the use of the criminal justice system to tackle the violence in Northern Ireland. Many of the features it identifies have prevailed throughout the 1970s while other appear to be new twists in the long catalogue of abuse. In conclusion it may be useful to consider how these malpractices have been allowed to continue for so long, why new transgressions have been able to develop unhindered and what the implications are for the British government's attempt to eradicate the violence in Northern Ireland.

The Lack of Effort to Stem Police Abuses²

Where the individual transgressions amount to a continuing practice or where the police are pursuing a particular law enforcement policy which is operating oppressively against sections of the community then the onus is on the police authority to act. It has been seen, however, that it is quite content to allow the police a free hand in these matters and leave it to the government to take action when public concern becomes too difficult to ignore. The government, however, will only move to restrict the activities of the police and army when they are under extreme political pressure to do so. Apart from a few exceptional occasions the necessary pressure has not been forthcoming and it is unlikely that it will for the foreseeable future. The explanation for this is probably the most fundamental reason why the practices described in Chapters 2, 3 and 4 have been allowed to develop and continue for so long. That reason is, of course, the implacable resistance of the unionist majority to reform in this field.

The unionists perceive the current violence as simply another attempt by republicans to overthrow the British presence in Northern Ireland and force a reunification with the rest of Ireland to form an independent, 32 county Irish republic. Their stereotyped response, therefore, consists of repetitive demands for tougher security measures against the republicans, along the lines of the methods they adopted while in Stormont. They welcome aggressive policing policies and the Diplock courts. In fact their primary concern is that these measures are not tough enough. Their representatives regularly call for existing constraints on the police and army to be relaxed and for the introduction of internment; in other words a return to the military strategy of the early 1970s. They have even welcomed the use of plastic bullets and the latest 'shoot-to-kill' strategy. They attack the slightest suggestion of reform in the law and order field and brand it as a capitulation to terrorism. They seize on every major violent incident in Northern Ireland and use it to flay the government with accusations of being soft on terrorism.

Given that the unionists constitute the majority in Northern Ireland and that they outnumber the other Northern Irish representatives at Westminster in the ratio of nearly eight-to-one, it is very difficult for the minority to make their grievances heard let alone have them remedied. In this situation the British government will not ignore unionist demands lightly. Certainly, it is not likely to risk provoking them by curbing police and army powers and abuses and dismantling the emergency apparatus. But there are other reasons why the British government has not taken this course over the last 14 years and is unlikely to do so in the future. Not the least of these is that it, too, perceives the conflict as an essentially law and order problem. Since 1973 it has not embarked on a political initiative aimed at tackling the fundamental roots of the conflict. The forays it has made in this area have been directed more towards promoting dialogue between those representatives on both sides of the religious divide who are prepared to participate in a Northern Ireland administration within the current constitutional framework.³ It has failed totally to apply itself to the basic conflict of national identity which has been at the root of the Northern Ireland problem at least since 1922. By focusing on the law and order aspect of the conflict and branding it as a mere upsurge in criminal activity to be dealt with primarily by the police and army, the British government has committed itself to showing success in the law and order field. Success here means being able to produce statistics every three or four months which reveal an increasing number of arrests, charges and convictions as well as the seizure of greater quantities of arms, ammunition and explosives and a decreasing level of violence. Failure to maintain this would suggest that the government was losing the struggle in Northern Ireland. To be assured of these statistics the police and army must be allowed to operate free of stringent controls and the safeguards for the accused in the Diplock courts must be restricted. It is highly unlikely, therefore, that the British government is going to make any significant changes in these fields without first radically altering their approach to the Northern Ireland problem.

"Normal Life" Under the Emergency Legislation:

Another factor which has contributed to the continuity and spread of malpractice and abuse in the criminal justice system is their normalisation. They have prevailed for so long now that sections of the community have increasingly come to accept many of them as the norm. In those areas which are policed jointly by the army and RUC it is a regular occurrence to be stopped on the street and questioned by a soldier or armed policeman. Equally so, being arrested by the army under section 14 of the EPA or by the RUC under its emergency powers is a fact of life which people in these areas have come to accept. Perhaps the most telling indication of this phenomenon is the common response by individuals when approached for an interview during the interview survey — 'OK, but nothing happened'. What they were referring to as 'nothing' consisted of being forced out of bed at 5.30am by armed soldiers or policemen and being taken to an interrogation centre where they were detained and questioned over a period of four hours, three days or seven days depending on the power used.

The Futility of Emergency Legislation:

The Future

It would appear from this and previous research and, indeed, from recent election results that the criminalisation policy has failed. The violence has not been eradicated nor are there any prospects that it is likely to be in the foreseeable future. It may have decreased in volume since the early 1970s, but that is not so much an indication of its progressive elimination as a reflection of its changing nature. Today it consists primarily of gun and bomb ambushes on and by the security forces as opposed to bombing town centres, daily sectarian shootings and the major gun battles. Attacks on the security forces and attacks by them on suspected terrorists have become a regular feature in Northern Ireland. Indeed, it would be fair to say that this type of violence has become institutionalised. The special courts, interrogation centres, exclusion orders, plastic and real bullets and wide operational powers conferred on the army and police have not succeeded in eliminating it. More importantly, they have not managed to defeat the organisations orchestrating it. On the contrary, it can be argued that they are actually fuelling the violence and increasing support for the organisations involved. This stems from the impact that the persistent malpractices and abuse have on sections of the community.

To understand fully the impact on the community it is necessary to grasp how the emergency apparatus is deployed throughout Northern Ireland. Large sections of the community rarely experience any of its excesses. In fact it can be said that its operation is concentrated in relatively small, well defined republican areas throughout the six counties. It is true that it is also activated against loyalists, but in their case it is directed against specific individuals living in communities which are otherwise unaffected by, and often unaware of, its operation. It is not difficult to assess the feelings of republicans about the criminal justice system today. Even before the current outbreak of hostilities respect for and confidence in the administration of justice in Northern Ireland was never high among the republican community.

The Last 14 Years in Northern Ireland:

But now, after 14 years of deaths from rubber, plastic and real bullets, internment, detention without trial, exclusion orders, repetitive early morning arrests for intelligence gathering, surveillance and harassment, oppressive interrogation sessions, house and body searches, aggressive policing policies by the RUC and army, Diplock courts, long periods of remand in custody, the use of supergrasses, the abduction of families, convictions on the basis of suspect confessions and heavy prison sentences all in the name of law and order and with little or no means of redress, one can hardly expect that their respect or confidence has increased. On the contrary, the alienation, frustration and anger which these methods have produced in these areas have severely damaged, if not destroyed, the chances of encouraging their support for and confidence in the RUC, the courts and the government.

A Proposed Solution:

How then can the problem be tackled? It should be obvious that mere tinkering with the system would produce no improvement at all. Nothing less than a radical overhaul is required. Nor should this overhaul be confined to the criminal justice system, but it should extend to a total reappraisal of how to tackle the situation in Northern Ireland. The criminal process has been used for so long now in the forefront of the government's political strategy for dealing with the violence that it has become polluted with the hostility felt by sections of the community in Northern Ireland against the British government. This, of course, has been exacerbated by the manner in which the criminal justice system has been used. If the police, the courts and the law are to win the confidence, respect and co-operation of all sections of the community then not only must they be reformed, but that reform just take place as part of a radical reform in the government's strategy for dealing with the fundamental roots of the problem in Northern Ireland. How the political problem could and should be tackled is a book in itself and would extend far beyond the criminal justice system. But something can be said here on how the failings of the current criminal process could be tackled. It must be emphasised, however, that the proposals are to be seen in the

context of a radical new approach to the overall problem. Without that they cannot achieve their objective.

Police and army powers of stop and question, arrest and interrogation is one area in which reform is long overdue. It is easier to deal first with the army because it should not be used at all as an internal peace-keeping force. It may, of course, be necessary to resort to the army in time of a short-lived, acute, internal crisis. But to use it as a *de facto* permanent peace-keeping force is to go far beyond that. It is a recognition of the fact that the crisis is anything but short-lived. In this situation it is not the army that is needed but radical and decisive political action. So not only should the army's emergency powers of arrest and stop and question under sections 14 and 18 of the EPA be removed, but the army itself should be removed. Nor should the police be allowed to duplicate the role of the army as that would be to perpetuate the same situation using different terminology. The RUC's use of guns, plastic bullets and armoured Land Rovers as standard policing equipment, therefore, should cease and they should be returned to a civilian peace-keeping role. In that civilian role they, too, should have no need for powers of stop and question. Their right to require the co-operation of the public should not be based in the criminal law but in them establishing a healthy relationship with all sections of the community. Section 18 of the EPA, therefore, should be abandoned in its entirety.

The repetitive arrests for intelligence gathering, surveillance and harassment stem from the RUC's very wide powers of arrest. If the citizen is to be protected from this arbitrary abuse of power then the RUC should be allowed to arrest only on reasonable suspicion that the individual has committed, is committing or is about to commit a serious offence. Furthermore, they should be required to tell the suspect at the time of his arrest what offence he is suspected of. Nor should the RUC have the power to hold him for up to seven days. Such powers only encourage abuse and greatly magnify the frustration felt by the citizen in being deprived of his liberty in the first place. So sections 11 and 13 of the EPA and section 12 of the PTA should be abolished. The RUC should be required to bring the arrested individual before a magistrate or release him as soon as possible or at any rate not later than, say, 48 hours after his arrest.

Recommendation: Abolition of the Diplock Courts—

PLEASE NOTE:

Much injustice is created by the absence of a jury in the Diplock courts. Given the nature of the charges being heard in these courts and the length of sentences being meted out it is desirable that the protections available to the accused should not be diminished in any way. One very important protection is, of course, the jury. It avoids the case-hardening phenomenon which appears to be a factor in the Diplock courts and it also prevents any prejudice to the accused resulting from the judge acting as arbiter of both law and fact. The reasons originally given for abolishing the jury in Diplock courts were that there was a danger of jurors being intimidated or being prejudiced. The latter reason has not resulted in the abolition of the jury in the coroner's court even for inquests into deaths resulting from the troubles. So if it is not thought that it would be prejudiced in the coroner's court, why is it thought that it would be prejudiced in the Diplock courts? In any case the judge can take steps to reduce this danger. As for intimidation no firm evidence was ever produced to show that it was a very real factor. So until such evidence is forthcoming it is surely unreasonable to deny such a fundamental protection as to the right to trial by jury for serious charges. A return to jury trial for such offences would also reduce the dangers of ordinary criminals being processed through the emergency apparatus.

Supergrass Trials:

One aspect of the criminal process which is becoming more common and is giving rise to some concern is the use of supergrasses. The reform of police arrest and interrogation powers may cut down on this practice but it will hardly eliminate it. Given the inherent unreliability of, and the suspicion attached to, the evidence of a supergrass, and particularly where immunity from prosecution has been granted, special provision should be made in relation to it. The rules of evidence should be changed to require the judge in every such case to find corroboration of the supergrass evidence before conviction. That in itself will not resolve the moral objection to the use of supergrass evidence but at least it will help protect against persons being convicted for offences they did not commit.

Other Emergency Powers:

This book has not dealt at all with some aspects of the emergency legislation. Examples of those areas not covered are exclusion order, extensive powers of occupation, search and seizure conferred on the police and army and the restrictions on the granting of bail. Obviously these are all measures which should find no place in a liberal, democratic society where the powers vested in the government should be used for the benefit of the whole population and not for the purpose of conferring benefits on some and repressing others. These too, therefore, should be abolished.

Lessons to be Learned

The obvious lesson from the foregoing analysis is that the criminal process should not be relied upon to resolve essentially political problems. But it also serves as a warning to any state attracted by the argument that major increases in police powers provide the solution to problems of an increasing crime rate and civil disorder.



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(Partial List)

October 22, 1985

Chairman

Foreign Relations Committee

United States Senate

Washington, D.C. 20510

Dear Mr. Chairman:

I wish to thank you and the committee for giving me the opportunity to present my views on the supplementary extradition treaty between the United States and the United Kingdom. It is my view that this treaty is, first of all, a legal matter and should be referred to the Judiciary Committee for their consideration. Also, I believe that in the best interests of the United States, it should be utterly rejected.

The United States has been viewed, since its founding, as a haven for dissent and a place of refuge for dissidents, who oppose intolerant governments. It should not be an arbitrary consideration, thus allowing refuge, nor should it be judgemental, that those seeking refuge may have used violence or non violence to attain their ends. The United States, should be the last nation on earth to judge another nation or people for the use of violence, when the founding of this country was based on violent revolution.

This supplementary extradition treaty makes judgements on the use of violence, when, in fact, it is up to those living under British oppression to determine if the course of non violence has run. We, from this side of the Atlantic,

can only contribute by non violent means, but to act and accused of contributing to violence because of a particular position is totally unacceptable.

The British dictate to the State Department on the issue of Ireland and State accepts their dictates, blindly. I have received handouts over the years from State and the British Information Service, and they are word for word the same. I hope this committee is not going to accept that the British want the U.S. to end the political exception in extradition which will not deter terrorists, but contribute to the elimination of dissent.

The U.S. was once looked upon as a haven, because the U.S. had a revolutionary tradition, that is, not to judge another country's revolution. However, depending on which administration, the U.S. formulates its morality and support on whether the oppressor or revolutionary is left or right wing. Now, the changing world in a time of great challenge, no longer looks at the U.S. as a model.

In recent years, the United States, like the Soviet Union, seeks to monitor and crush dissent. The U.S. uses its visa office as a tool of propaganda to control speech within borders, placing a chilling effect outside its borders. If this treaty is approved, America once again will say to the Irish, when it comes to freedom and the right to resist torture and oppression - "NO IRISH NEED APPLY."

We who have been educated in the United States are told at an early age that the United States is a melting pot for all nations. We are told that because of hunger and oppression, the shores of the United States have been welcome to refugees. One hears these epithets on patriotic holidays, as a reminder that the reason the United States is as it is constituted from the beginning, revolves around political oppression.

One learns at an early age that colonists in the early days, the mid eighteenth century, were politically oppressed by the British

government in London. After a period of harrassment, the Americans rebelled, most violently, against the British government. The rebellion, the first modern revolution, was not fought by the Marquis of Queensberry rules. Instead, it was the guerilla tactics and the strategy of terror that won the day for the Americans.

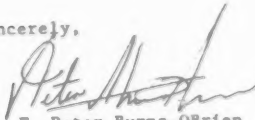
As a child, I was filled with stories of American triumphs in Boston, how the Sons of Liberty took care of Loyalist's. Some were tarred and feathered while others were assassinated. Some were burnt alive in their homes; men, women and children. This type of activity is terrorism, however, the victor claims it as heroism and winners are not called terrorists, but patriots.

We in the U.S., born under the covenant of revolution, violence, and terrorism, should be the last to make judgements. As a British General in the East Anglia regiment told me in Belfast: "You have no rights." This was in reference to my allegations that if Northern Ireland is administered by the United Kingdom, don't we have certain rights under law.

The U.S. was once the haven for dissidents because it started modern rebellion. With a treaty such as that proposed before this committee, the mantle of defender of freedom will no longer reside in the U.S.

I ask this committee to reject without reservation the Supplimental Extradition Treaty between the United States and the United Kingdom. Let us reaffirm the tradition of revolution in the United States. If Americans cannot reaffirm their revolution, they cannot affirm their own existence.

Sincerely,


 Dr. F. Peter Burns-O'Brien
 Deputy National Director

PBO/cb

RE: Background Information on Northern Ireland Judicial Process

Ireland has had various rebellions against England in modern times, taking its cue from the United States and French Revolutions. The first revolt was 1798, then 1803, 1848, 1867, and 1916, which culminated in the partition of Ireland into two statelets in 1922. The Irish Free State was made up of the 26 southern counties of the Ulster Province. The reason the other three were left out was to maintain a Protestant majority. In those areas that were heavily Catholic, discrimination in job hiring practices was made a policy. This forced mass emigration, preserving the Protestant majority, so the British could say that the North of Ireland would remain part of the United Kingdom as long as the majority there wanted it to remain so.

From the partition of Ireland to the present time there has been continued violence and the Irish people looked to the United States for refuge and moral assistance. The British in order to quell violence used internment without trial, which controverted the Common Law and was a disgrace to their democracy. This law did not apply to any other part of the United Kingdom and there was so much criticism of this practice, that they have changed tactics in the past ten years.

Oppression by the British Government in Northern Ireland has totally corrupted the statelet. Initial British state violence has spawned reactive terrorism. Terrorism is a type of violence which is hard to justify, and very often the methods used are very hard to defend. The reasons for the violence are understandable, but I think that in this day and age it should be possible to find other solutions than the use of violence.

In 1972, Amnesty International reported systematic torture by the British government in Northern Ireland.

In 1976, The European Commission of Human Rights found the British government guilty of torture in Northern Ireland.

In 1978, The European Court of Human Rights found the British government guilty of inhuman and degrading treatment in Northern Ireland.

In 1979, Pope John Paul II said in Ireland, "The moral law, guardian of human rights, protector of the dignity of man, cannot be set aside by a person or group, or by the state itself, for any cause, not even for security or in the interest of law and order."

In 1979, the British government conducted their own inquiry into arrest and interrogation practices. They found that prisoners were being ill treated and seriously injured by police while they were in custody. As a result of this, U.S. President Jimmy Carter banned any sale of weapons to British police in Northern Ireland; President Reagan has maintained this ban.

From 1980 to the present a soldier or policeman may arrest without warrant, someone whom he suspects as being a terrorist. There is no requirement that the suspicion be reasonable. He or she may be brought to one of the special interrogation centers for up to 72 hours. (Under the Temporary Provisions Act of 1976, a suspect may be held for up to 7 days without access to family or legal advisor).

The trial system of Northern Ireland uses non jury trials called "Diplock Courts" at which the onus of proof is on the accused. Coerced confessions as a result of ill treatment are admissible evidence.

The accused has the onus of proof to show that the ill treatment was torture, or the confession is admitted. Ninety percent of the convictions are obtained by this process. This violates Common Law.

Since 1980, the Crown has relied on evidence of alleged accomplices, "supergrasses" to secure convictions without corroborating evidence. This is not permitted in any other part of the United Kingdom. Several "supergrasses" have admitted perjury in previous trials, but their evidence has been allowed to convict even when described as "bizarre" by the Lord Chief Justice of Northern Ireland.

The system in Northern Ireland is corrupt and discriminatory and the people have no basic rights. When one nation's rights are threatened, it is the duty of those in other nations who can speak out to do so.

Congressman Hamilton Fish (R - NY) said after he returned from an investigative trip to Ireland for the House Judiciary Committee, "There is a role for the United States in attaining a peaceful political solution in Northern Ireland by playing the role of 'Honest Broker.' The Irish National Caucus wishes to see Ireland, like America, one nation indivisible under God, with liberty and justice for all."

LEGISLATIVE REPRESSION

The Special Powers Act, now superseded by The Emergency Provisions Bill, are two pieces of legislation enacted by the British Parliament at Westminster, London, for imposition on the Irish people of the Six Northeast Counties of Ireland. Both Acts are extraordinary measures and are in derogation of the basic human rights of those coming within their imposed administration. On paper, they are intended to sound necessary though a bit unreasonable, but in practice they are absolutely brutal and inhumane. The Special Powers Act had been in effect for fifty-one years and The Emergency Provisions Bill only a matter of months. The intent is identical in both, and the purpose of the latter is to continue the questionable practices of the former by setting out in law vague guidelines, so that any dastardly acts by the Crown's Forces might be systematically justified. Through the two pieces of legislation, the violation of human rights is perpetuated and legislatively institutionalized.

The Special Powers Act was utilized in a discriminatory fashion pointedly directed at the Nationalist Minority to subdue their political efforts thereby maintaining the sectarian state created by the partition of Ireland. "Discrimination might be described as unequal and unfavorable treatment, either by denying rights or social advantage to members of a particular social category; or by imposing special burdens on them; or by granting favors exclusively to the members of another category, creating in this way inequality between those who belong to the privileged category and the others." By this intuitive definition, it is clear that special burdens have been placed upon the Minority to be born only by them as the imposition of internment as their lot alone." When prejudice is directed against members of a certain religious or national group who may constitute a minority within the state and a majority within a neighboring state, "therein is contained the seeds of war."

A British Commission set up by the National Council of Civil Liberties in 1936 visited the Northeast of Ireland and studied the operation of The Special Powers Act on the spot. "In the considered opinion of the Commission, the Act is contrary to the fundamental principles of democratic government, in that it imperils the rights and freedom of law-abiding citizens." The Act's effect on the rights of the Minority is obvious: it is devastating prejudice and contrary to sane practice. The homes of the Nationalists are susceptible to unannounced entry at any hour and any member might be incarcerated without charge or trial.

Appendix E

Foreign Policy Reasons for Approving the Treaty

THE WHITE HOUSE

WASHINGTON

April 22, 1986

Dear Dick:

I understand your Committee will soon vote on ratification of the US-UK Supplementary Extradition Treaty. I am writing to emphasize the vital importance of this Treaty, both to our efforts to control terrorism and to U.S.-British cooperation in those efforts.

As Great Britain demonstrated once again last week, she is our staunchest Ally in the battle against international terrorism. Rejection of the Treaty would be viewed by the British -- and the world at large -- as a weakening of U.S. resolve. This must not happen. Indeed, we see Senate ratification of this Supplementary Treaty as a key element of our wider efforts to promote greater international cooperation.

I am hopeful that the Senate will reject efforts to weaken the Treaty in ways that would create new legal loopholes for terrorists. In this regard, I understand some have suggested that the Treaty be modified to extradite only persons charged with offenses against civilians. I frankly do not understand such an approach. Our own recent unpleasant experiences with terrorism clearly demonstrate that American servicemen are a primary target. We should not do anything that suggests in any form that it is permissible to attack soldiers or policemen.

As you know, the recently concluded Anglo-Irish Treaty has sent a signal of hope to all the people of Ireland. This sign of hope makes it all the more important, in my view, that the United States support political dialogue and condemn the bombing and wreckage imposed by terrorism.

I urge that you and your Senate colleagues ratify the US-UK Supplementary Extradition Treaty. I hope that you will share my comments with your colleagues. We need to stand tall with our British Allies at this important moment.

I am also contacting Majority Leader Dole in this regard.

Sincerely,

Ronald Reagan

The Honorable Richard G. Lugar
United States Senate
Washington, D.C. 20510

THE SECRETARY OF STATE
WASHINGTON

April 15, 1986

Dear Mr. Chairman:

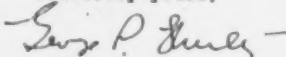
The Senate Committee on Foreign Relations is scheduled to vote tomorrow on the Supplementary Extradition Treaty between the United States and the United Kingdom. The President, the Attorney General and I regard this Treaty as a central aspect of the U.S. effort to fight international terrorism through the rule of law. Unless we are willing to fashion laws that provide for extradition of terrorists to other democratic states, we cannot expect other nations to extradite terrorists whom we seek to the United States.

I have heard that much of the opposition to this Treaty exists because of sympathy for the political goals of the people performing terrorist acts in the U.K. This Treaty is not "anti-Irish" in any sense. Rather, it reflects a principle that we are pursuing with other treaty partners in addition to Great Britain: that terrorism against democracies must not be protected as a political offense. This Administration recognizes the gravity of the problem in Northern Ireland. We should approach that problem through the proposed Irish aid package, not by protecting terrorists from prosecution in the U.K.

Yesterday's events involving Libya underscore the importance of approving this Treaty. No nation in the world provided the United States with such strong support in our action as did Great Britain. When we asked Britain for support on an issue involving terrorism of primary concern to us, the British accepted risks to their interests in order to promote the common welfare of the United States and the West. The British Government accords the Supplementary Treaty the highest priority and regards its ratification as a matter of paramount importance to the fight against terrorism in the U.K. It is through this type of cooperation that we and our Allies can build a successful structure for combatting terrorism.

I urge you to vote in favor of ratification of this Treaty.

Sincerely yours,


George P. Shultz

The Honorable
Richard G. Lugar,
Chairman, Committee on Foreign Relations,
United States Senate.

American Bar Association

April 16, 1986

The Honorable Richard G. Lugar, Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the American Bar Association, I wish to commend the Foreign Relations Committee for its consideration this morning of the Supplementary Extradition Treaty with the United Kingdom. Although the ABA did not have a formal position on the treaty at the time your committee began its consideration of the matter last summer, the Association undertook a careful analysis of the treaty over a period of several months. At its mid-year meeting in February of this year, the ABA House of Delegates approved a resolution recommending United States ratification of this treaty as an important step forward in this country's efforts to combat international terrorism within a legal framework. A copy of that resolution and its accompanying background report is enclosed. I urge the Committee to favorably report the U.S.-U.K. treaty to the full Senate for its expeditious advice and consent to ratification.

Thank you for your consideration of this matter.

Sincerely,

Robert D. Evans

Robert D. Evans
Director

1094b
Enclosure

cc: The Honorable Claiborne Pell
Members, Committee on Foreign Relations

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Extraditing Terrorists

A YEAR AGO in Brighton, England, terrorists bombed a hotel in which Prime Minister Margaret Thatcher was staying. She was not injured, but six people were killed and dozens wounded. If some of the criminals involved in that bombing turned up in, say, Seattle, would you not expect the United States to return them to Britain for trial? Given this country's strong and recently expressed beliefs about bringing terrorists to justice you may think that extradition would be a foregone conclusion, especially since the country requesting it is one with which Americans share values and a common tradition of justice. But that is not the case.

The current extradition treaty with Great Britain provides that the United States will not return persons charged with or convicted of "political" offenses, a category that quite likely would include an attempt on the prime minister's life. In a number of recent cases, in fact, American courts have refused to extradite persons charged with crimes in connection with the continuing violence in Northern Ireland. At least one is an escaped convicted murderer, but a New York judge held that since he had killed a British soldier his offense was a political one and he was not subject to extradition.

To provide a foundation for proceeding against terrorists now enjoying sanctuary in the United States, the American and British governments agreed last spring to amend the treaty and limit the

exception for political offenses. It would be unavailable in cases involving violence, hijacking and sabotage, hostage-taking and certain offenses involving firearms, explosives and damage to property. The amendments must be ratified by the Senate, but after three hearings by the Foreign Relations Committee—and a lobbying campaign by supporters of the IRA in this country—action on the proposal has been postponed. That is disgraceful.

For at least three years Congress has been grappling with legislation to amend the extradition law and set guidelines for the courts to determine which offenses are political. Nothing has been enacted. Some legislators believe that a single standard must be applicable to all countries, but that makes no sense. It is reasonable to differentiate between assaults against totalitarian governments and acts designed to overthrow a democratic government where there are alternatives to violence. There are valid reasons for refusing to send an accused back to a trial by a kangaroo court, but they do not apply in countries with an independent and fair judiciary. There is nothing inherently wrong with making different agreements with different countries.

The Senate's failure to ratify the treaty amendments not only affronts this country's relationship with a primary ally. Worse, it undermines the American position on all countries' responsibility to bring suspected terrorists to justice.

NEW YORK TIMES, 11 July 85

Sealing a Terrorist Foxhole

An important first step has been taken by Britain and the United States to seal a legal foxhole that shelters terrorists — the "political offense" exception in their extradition treaty. The two Governments have signed a supplementary treaty that would deny fugitives the ability to avoid extradition by claiming that their crimes were "political." The Senate's prompt ratification would encourage other countries to make the same sensible change.

Only a few months ago a Federal court in New York refused to extradite Joseph Doherty, a gunman for the Irish Republican Army who fled Belfast to escape trial for killing a British soldier. The court held that the alleged crime was "political," a valid if narrow reading rooted in an old tradition of giving asylum to fugitives from authoritarian countries.

The right of asylum is not jeopardized when democratic countries with similar legal systems agree to extradite all those accused of violent offenses — without "political" exceptions. An old and

swartzen impulse is mocked when the lawless can play one nation's laws against another's. And the game is widespread. France for too long resisted extradition of Basque terrorists to Spain, to the exasperation of a democratic Government in Madrid that has provided substantial autonomy to Basque regions.

Reconsidering the old doctrines of asylum is a vital complement to a serious anti-terrorist campaign. All United States extradition treaties incorporate the "political offense" exception. But why not let the State Department, rather than judges, decide when such an exclusion is warranted?

The Administration has proposed just that, and was ready to settle last year for a bill that retained court review for some offenses, but not hijacking, kidnapping and drug smuggling. Fatally weakened by other amendments, the bill was voted down by the House. With terrorism ascendant, the case for sealing the foxhole is stronger than ever.

EDITORIAL, ATLANTA CONSTITUTION 25 SEPTEMBER 1983

Take U.S. shield away from IRA thugs

Alarums, alarums! The English are coming! Beware, Americans, lest we allow the Crown to take that first step toward grinding us under its imperial heel.

If you are of Irish descent, chances are you may have already or may shortly receive a message to that effect from an outfit labeling itself the Irish National Caucus, which has adopted to its own ends sophisticated political action committee mailing techniques, bankrolled by various Irish-American organizations.

The INC's deceptively civil-libertarian warning focuses innocently enough on a proposed U.S.-British treaty revision, now under consideration in the Senate. The only substantial change in the accord would remove the "political exemption" clause, meaning that fugitives from British justice could no longer plead in U.S. courts that their felonies were politically motivated and thereby escape extradition.

To enact the revision requires the two-thirds approval of the Senate, however, and that's what the INC is attempting desperate-

ly to prevent in a misguided effort to shield fellow Anglophobes, no matter their crimes.

We're not talking about mere political dissenters facing tramped-up British charges; we're talking about accused or convicted Irish Republican Army thugs who cloak murder, kidnapping and bombing under the mantle of freedom-fighting, much the same way as Islamic Jihad skyjockers try to justify their barbarism.

There's not exactly a rash of IRA fugitives to our shores. Only four times within the last five years have accused or convicted IRA terrorists come before U.S. courts — but each time they have been spared extradition on the political exemption.

Now the Senate can right that legal perversion, send a message that America will no longer be a haven for the IRA's brutal brand of liberation and, in the bargain, set an example for the disposition of globe-hopping terrorists, drug-runners and their ilk elsewhere in the world.

All that with a single stroke: two-thirds approval of the revised treaty.

3 Nov 1985

The Sacramento Bee

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Volume 128—No. 18,738

Sunday, November 3, 1985

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Editorials

The Politics Of Extradition

Successive U.S. administrations have tried to update this country's more than 100 extradition treaties, some of them dating to the 19th century. In 1972, a treaty was concluded with Britain, but it failed to foresee the increase in terrorism that lay just ahead, or the degree in which some terrorists would take advantage of a longstanding provision — the so-called "political exception" clause, in effect for nearly a century — by which American judges may refuse to extradite fugitives if their offense is regarded as political in nature.

There is a logic to such a provision when genuine political dissidents seek refuge from oppressive regimes. But in the recent past, four men accused of murderous acts in Britain or Northern Ireland as members of the outlawed Irish Republican Army have avoided extradition by persuading federal judges that their offenses were political, not criminal. Because the Provisional IRA, even though illegal, has a command structure and defined political objectives, a federal judge reasoned, the murder of a British soldier by one of its members was political in nature and thus not an extraditable offense. By law, the executive branch cannot overrule such decisions. (Conversely, however, the president or secretary of state may refuse to send back a fugitive ordered extradited by a court.)

To close this loophole, the Reagan administration has negotiated a revision to the 1972 treaty with Britain that would declare a number of crimes non-political in nature, and thus extraditable offenses. Among them: murder, kidnapping, sabotage, hijacking or conspiracy to commit any of those crimes. Such offenses as civil disobedience, seditious libel

and even treason would remain classified as political and thus not subject to extradition. That seems a reasonable compromise.

But critics, who include all eight Democratic members of the Senate Foreign Relations Committee now considering the changes, object that such an accord could result in the extradition of dissidents on political grounds masked as criminal cases. That's doubtful, since the revisions make clear distinctions between political and criminal offenses, and correspond to the same distinctions that exist in U.S. law. Moreover, the argument that IRA members cannot get a fair trial in British courts is not borne out by experience.

A vote against the proposed revisions would, in effect, be an unjustified vote of no-confidence by the U.S. Senate in the British system of justice. By implication, it would place this country on the side of the IRA in a struggle that's being waged in a murderous way that goes far beyond legitimate political dissent. The modified treaty is virtually identical to accords already approved with Mexico, Colombia and the Netherlands, which suggests that some of the opposition stems as much from the politics of the Irish conflict as from fastidious concerns about the legal rights of fugitives.

Ratification of the U.S.-British treaty revisions, and of proposed changes in accords with other democratic nations caught up in the fight against terrorism, is needed to strengthen the democracies' hand in that fight. As proposed, these changes would close loopholes used by murderers while protecting the rights of legitimate political dissidents. The Senate should stop playing politics with this issue and ratify the changes.

The San Diego Union

Col. Ira C. Copley, 1884 - 1947
James S. Copley, 1918 - 1973

Editorials/Opinion

Helen K. Copley, Publisher
Gerald L. Warren, Editor

Page B-10

 A Copley Newspaper

Saturday, October 26, 1985

Extradition aid

Swift and precise extradition procedures can aid Western nations in the fight against terrorism. That's why the Senate should ratify the United States-United Kingdom Supplementary Extradition Treaty.

The present treaty, signed in 1972, allows fugitives to escape extradition on the grounds that their offenses were "political." Since 1979, four members of the Provisional Irish Republican Army convicted of murder or attempted murder have entered and remained in the United States, shielded by this political protection clause.

The most dramatic of these cases involves Joseph Patrick Thomas Doherty, who killed a

British soldier in 1981 and fled to the United States two days before his conviction. A U.S. District judge in New York City ruled that, because the victim was a soldier, the murder was a politically motivated act.

Murder, however, is a criminal act, regardless of the motive behind it or the occupation of the victim. As British Consul General Donald Ballentyne remarks, "The only way to promote one's political views is by peaceful and constitutional means: the ballot, not the bullet."

The Supplementary Treaty unmasks terrorists posing as political refugees and is retroactive. The treaty also closes the political offense clause for those in-

volved in crimes such as skyjacking, bombing, sabotage, and the seizure of hostages.

Yet, the revised treaty doesn't abrogate the lawful safeguards extended to accused citizens. It extends only to offenses more severe than U.S. felony crimes and doesn't diminish the requirement that there must be a substantive case against the fugitive.

Assistant Attorney General Stephen Trott correctly warns, "Right now, one of the most important things a terrorist can possess is an airline ticket to another country."

The Senate could make escape much more difficult for terrorists by ratifying the Supplementary Extradition Treaty.

Part II/Monday, October 21, 1985

384/589

Los Angeles Times

A Times Mirror Newspaper

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Tightening the Net

The Reagan Administration, practicing what it preaches on world terrorism, has signed with the British government an appropriate and useful supplement to the 1973 extradition treaty. It is aimed primarily at Irish terrorists but would apply to all who resort to violence.

Clear, unambiguous, effective extradition agreements are essential if civilized nations are to control international terrorism. The validity of that was demonstrated in recent days in the effort to bring to justice those responsible for the hijacking of the Achille Lauro.

Unfortunately, not all Americans agree. There are Americans who continue to support terrorism in Northern Ireland, and a number of Irish-Americans with a penchant for hating the British out of historic hostility, have mounted an intense campaign to block Senate ratification of the supplementary treaty. They are not likely to prevail. Congressional leaders, including distinguished Irish-American senators and members of the House, have come to recognize that the violence-driven minority in Ireland is an obstacle to the restoration of justice.

In at least four recent cases, extradition of alleged Irish Republican Army terrorists has been blocked by American courts on grounds that the crimes, however violent, were politically motivated. The courts have relied on an 1891 case to support their decisions. The supplementary treaty now before the U.S. Senate for ratification would end the ambiguity by stripping away the political protection for the crimes commonly associated with terrorism, including seizure of aircraft, kidnapping, bombing and murdering. Ratification would permit extradition procedures to be renewed in the outstanding cases and would clear the way for a prompt response to new ones.

Opponents have raised arguments of principle, asserting that the agreement would expose to questionable justice many involved in crimes in the distant past of Irish-British hostility. Those arguments are not valid. The system of British justice applied in Northern Ireland has shown

every sign of working fairly. There are no juries for the obvious reason that in the present state of emergency in North Ireland no jury could be assured protection. But last year alone, 84% of those brought to trial were acquitted. Only this month, one of the most notorious suspects, the first, in fact, to be extradited from Ireland itself, won an appeal in the British court from his conviction. The proposed changes in the statute of limitations confirm to other recent treaties and do not alter that status of those suspected of crimes of many years ago. There is no intent to press charges in old cases, but their status is unchanged.

There is no secret about the intentions of this supplementary treaty. It is to close an escape hatch for persons suspected of terrorism. It is another step toward constructing valid, effective, constitutional rules of law to control those who have deliberately abandoned legal and democratic means, choosing bullets instead of ballots.

FROM B.C.S. L.A.

10/21/84 09:37

P. 2 TOTAL P. 2

384/546/1



476 Los Angeles Herald Examiner, Friday, October 18, 1968

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Politics and extradition

F The difference between political dissent and criminality is often in the eye of the beholder. Still, great democracies like the United States and Britain ought to be able to come to a mutually acceptable standard by which to measure the difference. In fact, however, they have not — at least not in their existing extradition treaty, which exempts "political" offenders from extradition, virtually without regard to any crimes they may have committed.

Just last year, for example, a federal judge in New York refused to permit the extradition of an Irish Republican Army member who was convicted and imprisoned for murdering a British army captain in Northern Ireland, only to escape to the United States. The judge found

that the killing was a political offense as defined in the existing treaty. Nor was this an isolated case. At least three other IRA fugitives accused of violent crimes have similarly been saved from extradition.

A solution for the problem is at hand. An amendment allowing extradition of persons accused or convicted of violent crimes, whatever their political bent, has been initiated by the two governments and is before the Senate Foreign Relations Committee. This is not the kind of agreement the U.S. could reach with any country. But the U.S. and Great Britain share similar standards of justice and a similar commitment to the protection of political dissent. With that in mind, we urge the treaty amendment's swift ratification.

A-10 Monday, October 14, 1985 ★ ★

San Francisco Examiner

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Editorials

No refuge for terrorists

THE TRADITION of the United States as a haven for political dissenters was never meant to shelter terrorists who kill and maim innocent people and then flee the legal processes of friendly, democratic countries. But that has happened in a handful of cases where persons accused of violent crimes in the United Kingdom have fended off extradition by claiming to be Irish patriots. One such defendant has been held for years in San Francisco while courts consider arguments and appeals.

A pending change in the British-American extradition treaty would attempt to close the gap in the agreement for returning fugitives to face prosecution where their alleged crimes took place. The proposed revision of the 1972 treaty was signed last June by the Reagan administration and the Thatcher government and awaits ratification by the U.S. Senate. The senators should give their consent by the required two-thirds margin.

The supplementary treaty would limit the exception for offenses "of a political character." The exception would not apply to serious crimes of violence: killings and malicious infliction of injury, bombings and bomb-making, aircraft hijacking and hostage-taking. Defendants accused on substantial grounds of such normally extraditable crimes would not be able to claim special treatment as political

dissenters, at least where the claims of British and American justice are concerned. The treaty change should improve the currently confused state of U.S. judicial handling of such extradition issues, which require judges to distinguish between properly excepted political acts and wanton crimes, often without understanding the foreign context.

Much of the opposition to the revised extradition treaty has come from U.S. supporters of the Provisional Irish Republican Army and its violent campaign against British control of Northern Ireland. IRA terrorism is as abhorrent to the democratic government of Ireland as it is to Britain, but some on Capitol Hill listen more to IRA apologists than to responsible Irish and Irish-American opinion.

The proposed treaty revision applies only to extradition arrangements with Britain, which has a recognized record of judicial fairness. It would not affect refugees from communist and other undemocratic governments. The change would strengthen both American and British defense against terrorism, and might be emulated where desired in other U.S. treaties with stable democracies whose judicial systems we trust.

The Senate should accept the recommendation of the administration and ratify the measure as a part of the worldwide battle against terrorism.

16 October 1985
San Francisco Chronicle

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EDITORIALS

No Sanctuary For Terrorism

THERE IS ONE clear lesson in the international furor over the release of Mohammed Abbas, the suspected mastermind of the terrorist hijacking of an Italian luxury liner and the murder of an American tourist. Terrorism will not be stopped until nations stop providing sanctuary, safe passage or diplomatic passports for terrorists.

The Abbas incident offers several examples. Egypt had him, along with the four actual terrorists, but never said it planned to prosecute. Italy had him, but freed him almost immediately because he enjoyed the diplomatic immunity of an Iraqi diplomatic passport and on the disputed grounds that the U.S. government did not show sufficient evidence to hold him for investigation and prosecution. Yugoslavia had him, but had no interest in keeping him.

It is little surprise that Yugoslavia, a non-aligned nation, should return a fugitive already released by Italy, a western ally, but it hardly helps Yugoslavia's arguments that the U.S. should return an accused Nazi war criminal wanted in Yugoslavia in the deaths of 700,000 Jews, Serbs and gypsies.

UNTIL CIVILIZED nations are willing to return wanted terrorists and war criminals for proper trial, the efforts to combat international terrorism will continue to be undercut.

The U.S. is not without its own problems in this regard. In addition to at least one accused war criminal, the U.S. is also haven to several accused terrorists from the Irish Republican Army, including individuals who have been tried and convicted in Ireland of terrorist murder and bombings.

A treaty between the U.S. and the United Kingdom, providing for the extradition of terrorists, is now before the Senate. Its ratification will be an important blow against international terrorism.

RECIPROCITY IN WASHINGTON

The British government took upon itself political opprobrium last week by its approval of the use of American bases in Britain for the Libyan strikes. It offended, the polls said, a wide swathe of British public opinion. Is it not time for the government of the United States to pay a debt?

This may not be language considered polite in diplomatic circles. But it is talk the American people understand.

Before the United States Senate this week is ratification of treaty amendments with the effect of forbidding fugitives from United Kingdom justice to claim in their defence that their crime was somehow political. As it stands American law damages sound administration in Northern Ireland and offends against justice in the United Kingdom at large. American legislators should observe the norm of reciprocity and change it. The British government should try directly to influence them.

The government of the United States speaks with several voices. One belongs to the Democratic minority of the Senate Foreign Relations Committee. It has bottled up the treaty for reasons partly procedural (it wants to secure the early passage of an Irish financial aid bill), partly principled, and partly electoral.

There are in the Senate, and not only among the Democrats, politicians who are devout believers in the twentieth century doctrine that homi-

cide is not murder provided it is carried out in the right spirit. For some legislators with Irish-American constituencies the right spirit is intent to unify Ireland under the flag of revolutionary nationalism. American courts, fiercely proud of their prerogatives, have bought such exculpation for terrorists, too.

Applications by Mrs Thatcher to the White House are going to be of limited worth — and not because of any ambiguity on the President's part concerning Irish terrorism. President Reagan has pushed the amendments through. His administration has deployed the federal authorities against gun-running and tax evasion by American supporters of the IRA; the Federal Bureau of Investigation has been especially active.

But the political fact is that the President cannot guarantee Congressional outcomes and the White House has only a limited amount of capital to expend in its dealings with Capitol Hill.

The Foreign Office's instincts might be to take an elevated tone. It would emphasize commonality of interest among democratic societies against terrorists who reject the very basis of politics.

Along this high road there would be presented to the Americans evidence mentioned by Mr Tom King over the weekend that the greenery of Irish nationalism has been tainted by the green of Islamic

crusade against the West. Qaddafi has through his money and armaments supply been an actor in Ulster, and Americans should be told the company that Noraid keeps. The Provisional IRA is according to any of the salient definitions a *fomentor of revolution*, anti-American in most of its reflexes. These points are all sound and well worth putting again to the American public. But they are not what is required.

The British in Washington have in the past tended to be rather gentlemanly about the issue of Ireland, relying on formal testimony and genteel lobbying on the cocktail circuit. The time has come for Sir Oliver Wright to take a lesson from the book written by America's other allies and engage full bloodedly in the round of high pressure salesmanship.

Capitol Hill is a circus of competing interests, but one uniquely open to suasion by appeals to the constituents. Mrs Thatcher's credit with the people of the United States is at an all time high; the government could do worse than employ some Madison Avenue skills in putting over the British case.

One can feel Foreign Office sensibilities freeze at the prospect. But this is the time for action. Let it be simply put to the voters in the states who alone can bring the pro-IRA senators to book: you owe us one.

Monday, June 16, 1986

THE NATIONAL LAW JOURNAL

The Weekly Newspaper for the Profession

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No Way to Fight

WE ARE AGAINST terrorism. But we are also against the Reagan administration's dubious efforts to fiddle with American extradition law as part of the fight against terrorism.

The current keystone of that effort is a proposed extradition treaty with Great Britain that picked up steam in the Senate last week. The pact would prevent Irish Republican Army fugitives resisting extradition from claiming that certain violent acts were "political."

The issue has nothing to do with indiscriminate attacks on civilian targets in Northern Ireland or elsewhere. Under existing case law, American courts will not recognize attacks on civilians as "political offenses." Instead, the dispute is over the ability of dissident groups — like the IRA, or Nicaraguan contras — to resist extradition for politically motivated attacks on military targets.

If the administration wanted to wash its hands of politically motivated violence entirely — uniformly extraditing Irish dissidents, Nicaraguan contras and Afghan rebels — it would at least be taking a principled position. But that's not what its treaty-by-treaty approach contemplates.

Instead, the plan is to extradite IRA fugitives, but not extradite those who have engaged in identical acts in Nicaragua or Afghanistan. And as a result, we view the issue as one of individual rights and equal treatment.

In foreign policy, no one expects governments to treat friends and foes alike. But American courts, in the exercise of police power over individuals, should not be enlisted into administering uneven and politically motivated justice. They should, instead, continue to neutrally administer the objective principles of a uniform political-offense doctrine that is well-grounded in this country's own revolutionary past.

The New York Times,
December 13, 1935,
Page A34, columns 5-6

'Terrorist' as a Name for a Weaker Political Foe

To the Editor:

To "terrorists," David K. Shieler correctly points out ("Anti-Terrorism Can Also Have Its Price," *Week in Review*, Dec. 1), "murders, kidnappings and hijackings are 'operations,'" and this labeling is not irrational. The conclusion is that "terrorism" is not likely to be controlled by treating as common criminals those whom a defending government so labels for political reasons in disregard of motives and origins.

This conclusion in no way favors the victory of "terrorists"; it would lead to international cooperation in trying or extraditing as "war criminals" those who commit atrocities and in depriving havens for operations, even in Libya and Tunisia, under the laws of neutrality and war.

How odd to see in the same day's letters, Abraham D. Sofaer, legal adviser to the State Department, saying that the best way to stop the fighting in Northern Ireland is to accept British classification of Provisional Irish Republican Army members as "terrorist" murderers, even when they attack only military targets, who should be subject to extradition regardless of the "political offense" exception to our extradition treaty with Britain.

Mr. Sofaer's view that the U.S. must ratify a supplemental treaty eliminating the "political offense" exception "or lose its moral and legal standing to demand the extradition of politically motivated terrorists from other democratic regimes," seems shallow. Rules of law already exist, including laws concerned with refusing admission to alien "war criminals"; trying American "war criminals," and trying or extraditing persons accused of "grave breaches" of the 1949 Geneva Conventions.

He is wrong to seek help to "overcome intense lobbying by some Irish-American groups" as if the Senate committee's refusal to pass on the proposed new treaty were the result of ethnic lobbying and not the committee's good sense. And if the "similar cases that we are negotiating with other allies" refers to Israel, and an attempt is in train to pit patriotic Irish-Americans against patriotic Jewish-Americans, the political cynicism in the cause of a U.S. policy ill based in morality and unnecessary in law is conspicuous.

ALFRED P. RUBIN
Medford, Mass., Dec. 2, 1935

The writer, professor of international law, Tufts University, heads an international law committee on extradition.

The New York Times,
December 1, 1985,
Page E14, columns 5-6

Moving on Politically Excepted Terrorists

To the Editor:

In her Nov. 15 column ("Which Terrorists to Punish?"), Flora Lewis endorsed the supplementary extradition treaty between the United States and Britain, which would preclude terrorists from invoking the political-offense exception to extradition. She correctly noted that ratification of this measure is necessary if the United States is to expect cooperation from other countries in extraditing terrorists here.

Miss Lewis erred, however, in stating that the Administration hasn't made any great exertion to get the treaty through the Senate. Nothing could be farther from the truth. The State and Justice Departments have worked vigorously to secure ratification. We have testified before two Senate committees, prepared answers to dozens of questions and detailed memoranda on selected issues and met with any senator willing to see us.

We have particularly emphasized that the U.S. must ratify this treaty or lose its moral and legal standing to demand the extradition of politically motivated terrorists from other democratic regimes. One of the nations with which we are seeking to negotiate a narrower political-offense exception recently responded to our criticism of its refusal to extradite a violent fugitive to the U.S. by pointing

to the refusal of our Federal courts to extradite suspected Irish Republican Army terrorists to Britain.

We are delighted to have Miss Lewis on our side in this effort to overcome intense lobbying by some Irish-American groups. If we are to succeed in using law against terrorism, the Senate should ratify this amendment of the political-offense exception, along with similar ones that we are negotiating with other allies.

ABRAHAM D. SOFAER

Washington, Nov. 18, 1985

The writer is legal adviser to the Department of State.

THE NEW YORK TIMES, THURSDAY, AUGUST 22, 1985

Letters

A Treaty That Would Belie U.S. Neutrality on Northern Ireland

To the Editor:

The Senate Foreign Relations Committee has demonstrated great prudence in its decision to schedule additional hearings on the Supplementary Extradition Treaty recently signed by the United States and Britain.

This document is both extraordinary and significant in effect. Its ratification will result in the virtual elimination of the "political offense" exemption, which has been a cornerstone of extradition law and treaty in the United States and Britain for more than a century. The exemption has been applied in several recent cases to bar the extradition of certain individuals accused of crimes in Northern Ireland. The treaty would upon ratification be made retroactive.

In testimony on Aug. 1, Abraham D. Sofaer, legal adviser to the State Department, made the incredible statement that the supplementary treaty had nothing to do with U.S. policy with respect to Northern Ireland. Nothing could be more distant from the truth.

Ratification will have a profound impact on Northern Ireland, especially on those who choose to oppose British policies through nonviolent means. It will also represent a quantum leap away from the State Depart-

ment's long-standing contention that the U.S. is "neutral" with respect to Northern Ireland. The treaty makes a strong political statement, for it acknowledges and accepts the political status quo in Northern Ireland, a most dangerous and unwarranted position for the United States to take.

Democracies are sustained by their respect for and adherence to the rule of law. They are undermined when they selectively propose alterations of laws that lead to weakening or total elimination of the protections that emanate from such laws. Such is the case with this treaty. The Senate

must be extremely wary of the motives of the British Government — whose policies in Northern Ireland are anathema to democracy — in advancing it.

There are many questions to be answered. At the very least, the treaty is in obvious need of modification. Careful examination should result in some important Senate advice as a precondition for consent.

MARIO BIAGGI
Washington, Aug. 6, 1985

The writer, who represents New York's 19th Congressional District, is chairman of the ad hoc Congressional Committee for Irish Affairs.

NYT

A19

ESSAY | William Safire

June 30, 1986

Stalker's Last Case

LONDON

John Stalker was born with the perfect name for a policeman. The verb "to stalk" shares an Old English root with "to steal," and means to creep stealthily in search of prey.

In what may be Mr. Stalker's last case, the deputy chief constable of Manchester found himself on the trail of prey that his higher-ups did not want caught. The suspects were members of the elite security forces assigned to stop Irish terrorism; the potential crime being investigated was a secret policy of shooting to kill those thought to be I.R.A. terrorists.

No cop likes a "shoofty," a policeman who keeps other police honest. But in two years, more than 30 shootings of suspects had taken place in Northern Ireland. A powerful article from Belfast in April 1985 by Jo Thomas of The New York Times reported angry denunciations of "trigger-happy hit squads" who biased away and asked questions later. When the world press gets interested, emotions have to be gone through, and the respectable Constable Stalker was chosen.

Apparently he did his job too well. He followed the tracks of the shootings into the office of Sir John Hermon, Northern Ireland's top police officer, and reportedly found embarrassing shoot-to-kill connections to MI-5, the secret service. As a result, Mr. Stalker was taken off the case, his draft report suppressed; he is now under investigation himself for any kind of wrongdoing. The worried security forces can pin on him to discredit his findings.

Does this sound familiar? Switch the locale to Israel from Ireland; substitute Avraham Shalom, head of the wild-running Shin Bet security force for Sir John Hermon, head of the constabulary corrupted by its seal; cast Israel's former Attorney General, Yitzhak Zamir — fired for probing the police killings of two captured terrorists — in the role of John Stalker, his career ending in smears and whispers. The plots are amazingly alike.

The public reaction to these obvious cover-ups in both Great Britain and Israel is much the same. If the cops get rough with these animals, so what? If a little torture of a terrorist produces evidence, that saves the lives of scores of schoolchildren, where is the sin? The probes, the shoofties, are considered the villains; the security forces — even if they kill an innocent suspect or two while protecting the lives of thousands of ordinary citizens — are the heroes.

Most politicians ponder to that public reaction. In Jerusalem last week, Israel's president issued a pre-emptive pardon of security officials who

The hunter becomes the hunted

may have broken the law; in Ulster, the whistle-blowing investigator is being reviled and the shoot-to-kill policymakers are being protected.

Who objects? Only a motley bunch of media bleeding hearts and high-domed civil libertarians — themselves suspected of being soft on terrorism. Count me in that scruffy parade.

The primary purpose of a national security force is to protect a nation's interests and values; that requires extraordinary discipline. When that discipline is breached — whether by outbursts of rage to protect citizens' lives or by policymakers who think they can shortcut democratic justice — discipline to law must be reasserted in such a way that the pain or censure, whatever official manner is fairly warranted, makes the values are corrupted and the security force lost sight.

All democracies have their Water-gates; national strength is exhibited in the response to the question of any abuse of power.

The U.S. grudgingly paid its dues to discipline: a President was punished only after an investigation laid bare every offense, and someone went to jail; in the aftermath, the criminal activity of the C.I.A. was exposed and its intelligence activities were publicly condemned.

France killed the discipline test decisively in the Combes case. When the scandal broke, the President's secretary, the French Foreign Minister, and the Prime Minister all resigned. In the Shin Bet killings, the hiring of American spies, some Israeli politicians' racist demands of discipline and undermine the nation's values. (Nor is the Pollard affair over; I'm told a New Yorker, prominent in Jewish affairs, is likely to be implicated in the spy scandal.)

Now it's Britain's time of testing. "Stalker as Prey" runs one headline in the aroused British press; the security establishment is out to get this man before he gets them. We will soon see if the land that produced Magna Carta will tolerate the cover-up of a probe into the potential abuse of police power.

Terrorists endanger individual lives, but toleration of the cop who deliberately kills a suspect threatens our way of life. □

Dangerous Precedent

IRISH TIMES EDITORIAL

19-9-85

The extradition arrangements which exist between any two sovereign States are, strictly speaking, a matter for themselves alone, to be determined by agreement between the two Governments. A Dublin Government, *de jure*, has no legitimate interest in the proposed new extradition treaty between Britain and the United States and this is why the Government here has no choice but to remain silent in the matter.

But *de facto* the situation is quite different. The proposed enactment to give law to the new treaty is at present under consideration by the US Senate Foreign Relations Committee. It has attracted a great deal of angry reaction from the floor and not just from senators who have an ethnic or a "lobby" connection with Ireland. It is clear that the Bill under consideration, if passed into law, will mark a radical departure from the traditional safeguards which American law has provided for political fugitives down the years.

Those safeguards have been carried through to the US Constitution which partly derive from the British, including our own. A precedent set in America may well have an impact beyond its area of jurisdiction.

* * *

The essence of the proposal before the US Senate is that the so-called "political offence" clause should be neutralised. The clause has traditionally enabled persons whose extradition is sought, to claim that their offence was political in its nature or was connected with a political offence. American law and the laws of virtually all Western societies have recognised it as a valid ground upon which to refuse to extradite.

Debates have raged in many countries as to what constitutes a "political offence." The Supreme Court here has narrowed the definition considerably by its judgments in the McGlinchey and Quinn cases. But the Anglo-American arrangement now proposes is that this function should be taken away entirely from the courts and should be determined by administrative action — by the State Department in the United States. This is a dangerous precedent, and it would represent a significant loss of ground from the judiciary to the Executive and its agents if it were to pass into law. The fact that the Bill has been getting a rough ride in the Foreign Relations Committee, in spite of expectations in the White House of an easy passage, signifies the growing concern among the membership of the Senate.

* * *

It happens that this proposal involves a treaty with Britain and that one of the principal target groups — probably the only one in sight at this time — is made up of IRA and INLA men who have gone on the run and made it to the United States. But as some senators have now begun to realise, the arrangement might be replicated to enable Governments in other States to bring back their political fugitives in a similar fashion: anti-Marcos activists to the Philippines; anti-apartheid activists to South Africa, and so on. There are many world leaders today whose survival has been possible only through their successful invocation of the "political clause."

International terrorism requires firm and effective action between co-operating States. Some of those whom the British would bring back from the USA deserve to be brought to justice. But equally there are some — as there always have been — who have forsaken violence and who simply wish to be left alone. It should be left to the judges, who proclaim and protect the American principles of liberty, to decide what happens in each individual case. It is not something which should be entrusted to the officers of the State Department.

A bad precedent

Seattle Post-Intelligencer 7 NOV 1985

It would be a mistake to dismiss an argument over changes in U.S. extradition policies as either a predictable Irish-American brouhaha in defense of the militant IRA or, as billed by the Reagan and Thatcher governments, an effort to contain the spread of international terrorism.

The underlying and more important issue is whether to reject or retain the traditional idea that the United States may be a haven for revolutionaries who might suffer from "victors' justice" in their own countries.

The question arises because the Senate Foreign Relations Committee is considering ratification of a supplemental extradition treaty signed last June between the United States and Great Britain.

The supplement would delete the protection now offered to fugitives accused of political crimes, a protection rooted in 200 years of American history. The United States, born in a violent revolution, has been reluctant to hand over fugitives who, like George Washington and Thomas Jefferson, believed they must fight to overthrow a repressive government.

Under the existing treaty, a U.S. federal judge decides if extradition should be denied because the accused person's alleged crime was part of an uprising against his government.

The British want what they describe as that "loophole" eliminated. American courts have refused their request to extradite three Irish Republican Army members, accused of murder and other crimes. In Senate hearings, Irish-American organizations have presented much of the testimony urging retention of political protection.

However, legal scholars were among those who presented more compelling arguments against the treaty change.

Contrary to the administration's claim, existing treaty agreements do not protect terrorists. Those who commit wanton crimes against innocent civilians — blowing up a department store, hijacking an airplane or a cruise ship, holding or murdering hostages — cannot expect to escape justice by fleeing to the United States and claiming their acts were politically motivated. Legislation could make this distinction clearer, however, and a bill to do that is supported by many who oppose the treaty change.

If Congress should ratify the British treaty, the administration wants to make similar changes in extradition agreements with 88 other countries with the Philippines first on the list. Before proposing a supplement to the British treaty, the administration tried, but failed, to make similar changes in its agreement with the Philippines. Filipinos living in this country who oppose Ferdinand Marcos fear for their lives if they are sent home. Sen. Benigno Aquino, who might have been extradited without the shield of political protection, was in fact murdered when he voluntarily returned to the Philippines.

Changing the British treaty could set a dangerous precedent by giving the White House, instead of the courts, the power to decide who should be extradited. Inevitably, politics would taint the process. Could a president treat fugitives from governments friendly to the United States the same as those fleeing from those considered unfriendly? Such sensitive decisions are best left to the courts which can judge each case on the basis of law, not current foreign policy.

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Is U.S. Playing Politics With Extradition?

By JOHN KELLY

National Law Journal Staff Writer

IN HIS MAY 31 national radio address urging ratification of a new treaty with Britain to facilitate the extradition of Irish Republican Army fugitives, President Reagan emphasized potent political themes — not thorny issues of international and constitutional law.

A vote against the treaty, he suggested, was tantamount to granting "terrorists" a "safe haven" in the United States and would be an "affront" to British Prime Minister Margaret Thatcher.

The president's anti-terrorist polemic succeeded in putting the long-stalled treaty back on a political fast track before the Senate Foreign Relations Committee, whose chairman, Sen. Richard G. Lugar, R-Ind., was pushing late last week to endorse the pact with minor changes and send it along to the full Senate for a ratification vote.

But in the process, the speech glossed over a vigorous legal debate about the proposed treaty's drastic reduc-

tion of the judiciary's traditional role in American extradition law.

"You don't have to trample on a 143-year-old legal tradition to combat international terrorism," said an aide to Sen. John F. Kerry, D-Mass., who has emerged as a leading opponent along with Sens. Joseph R. Biden Jr., D-Del., and Christopher Dodd, D-Conn.

The tradition at issue is the "political offense" doctrine — a treaty loophole long used by countries around the world to refuse extradition in situations where a foreign crime has a distinctly political flavor.

The Reagan administration believes the doctrine originally was designed to protect non-violent dissenters against repressive monarchies and has been misapplied in recent judicial decisions to violent acts directed by groups like the IRA at democratic governments with open routes of non-violent dissent.

As a result, the proposed new treaty with Britain lists certain violent crimes — like murder and kidnapping — that are no longer to be subject to the political-offense exception. Similar treaties are planned with other "democratic" countries — but not with countries like Afghanistan.

Continued on page 8

Anti-Terrorism Polemics Intensify Extradition Debate

Continued from page 3

Backers of the change don't hesitate to suggest that politicians like Senator Kerry are just trying to put a respectable gloss of legal principle on their desire to curry favor with Irish-American constituents.

It is not only politicians and Irish Catholics, however, who worry about the way the debate has been framed so far and who contend that eradication of a doctrine that only a few IRA fugitives have relied on could have adverse legal ramifications that outweigh any contributions to peace in Northern Ireland or the broader fight against terrorism.

The critics say the political-offense rule is merely a catchphrase for a necessary and useful judicial role in extradition. Attempts to strip it away may unconstitutionally violate the separation-of-powers doctrine, they contend, and would violate settled international law principles of third-party neutrality in civil wars.

And country-by-country treaty decisions on whether to preserve or exorcise the political-offense doctrine, critics maintain, would unfairly subject individuals to extradition based on executive branch perceptions of who our friends are, rather than even-handed judicial application of neutral principles to individual situations.

One such critic is Prof. Alfred P. Rubin, who teaches international law at Tufts University's Fletcher School of Law and Diplomacy and chairs a committee on extradition and terrorism of the London-based International Law Association.

His logic begins with the premise that the executive branch cannot just pick people up and ship them abroad on its own. The act of seizing and extraditing someone, he says, requires judicial involvement—a principle established by the Supreme Court in 1795 in *U.S. v. *Laurence**, a case involving a deserter from a French ship.

And part of that judicial role, Professor Rubin explains, is application of the settled rule of "dual criminality"—a rule that requires courts to "mesh two entirely distinct legal orders" and determine whether the acts for which extradition is sought would constitute a crime under U.S. law.

In that context, Professor Rubin argues, political-offense treaty exceptions reflect a constitutionally mandated function of the judiciary.

He notes, for example, that all killings are not murder. One recognized privilege exists for self-defense, and another protects soldiers who kill in wartime in pursuit of a legitimate military objective. And serious separation-of-powers problems, he insists, are created by a treaty that attempts to impose on the American judiciary Britain's view of whether the actions of IRA fugitives fall within the soldier's privilege under American law.

"The attachment of legal labels to facts is not an executive or legislative determination—it's a judicial function," he contends.

"Aliens are entitled to due process and we are supposed to be a country that puts the rights of individuals ahead of an elusive concept of national interest," adds Prof. Francis A. Boyle, a treaty opponent who teaches international and criminal law at the University of Illinois College of Law. "But instead political considerations by the executive branch are being used to determine the rights of individuals."

'No Neutral Side'

So far, public debate over the British-U.S. treaty hasn't turned on the domestic balance between executive, legislative and judicial functions. But treaty defenders don't deny the existence of a tension. Instead, they say the new policy resolves it correctly.

"If there is a right of revolution in a particular situation, who should recognize it?" asks Richard E. Mesnick, chief majority counsel to the Senate Foreign Relations Committee. "A magistrate in Misou-

responsible for the foreign policy of the United States?"

And Mr. Mesnick dismisses arguments that judicial resolutions allow the government to maintain a neutral posture on foreign internal conflicts. "There is no neutral side," he says. "You either send the person back or you don't."

Other treaty supporters call Professor Rubin's separation-of-powers argument "ingenious" but wrong, because judges have no inherent power to consider political factors that might create a privilege under American substantive law.

The political-offense doctrine, maintains international law Prof. Steven Lubet of Northwestern University School of Law, is a creature of individual treaties. "The new treaty simply redefines the law," he says, "and then the courts apply it. There's no court-stripping at all."

Between those opposing views, it remains unclear where the balance of international law expert opinion lies. Proponents of the treaty frequently point out that in 1971 the European Convention for the Suppression of Terrorism adopted severe restrictions on the political-offense exception, and that domestically the American Bar Association and its international law section endorsed the proposed pact this year.

But both are debatable weather vanes. The European Convention explicitly granted signatories the discretion to preserve strong political-offense rules and opponents say, nine of 16 countries signing the convention have done so with political offense reservations.

As for the ABA, critics say, the international law section hopelessly contradicted itself by conditioning its endorsement on an "understanding that the United States and Britain 'do not contemplate either country being involved in a non-international armed conflict, civil war or insurrection."

That issue, and who should decide it, is precisely what the political-offense debate is all about, opponents say.

Tuesday, May 27, 1986

PHILADELPHIA DAILY NEWS

OPINION

The Philadelphia Daily News

Sam S. McKeel
President
Thomas E. Livingston
Managing Editor
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Senior Editor



Zachary Malberg
Editor
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Richard Aronson
Editor, Editorial Page

British Justice

Menachem Begin, Thomas Paine, Jomo Kenyatta, Eamonn DeValera, Mohandas Gandhi, Yitzhak Shamir, John Adams.

The only thing these men have in common besides having been national heroes who helped give nations birth is that the Reagan administration would turn them all over to the tender mercies of British justice. It doesn't take a lot of imagination to figure what British justice would have done with the lot of them. They would have been summarily shot like Connally, Pearse and MacBride in 1916.

For five years, the Reaganists have been claiming their "war against terrorism" requires changes in our extradition treaty with Great Britain. They say choices in extradition should be made by the State Department, not by judges. They demand Congress close a "loophole" in extradition law that allows revolutionaries to claim a "political crimes defense."

This "loophole" is the work of Thomas Jefferson, a dangerous man if there ever was one. Jefferson, a revolutionary himself, was intimately aware of the process of British justice in the colonies.

The fact is the Irishmen and Irishwomen who are fighting the British in Northern Ireland are exactly the kind of people Jefferson had in mind when the exception was first made in extradition treaties. Whatever you think of their cause, it is clear they are fighting an occupying army with the support of large numbers of the population.

Since Jefferson's time, the law has refined the concept of the human right to fight an occupying army. There are clear distinctions between such fighters and some whacked-out terrorist who merely slaughters civilians. Under current law, Irish fighters who commit such crimes are already extraditable. No changes are needed if they are the target.

The thing Ronald Reagan and Prime Minister Margaret Thatcher want to change is the exception for people who fight a legitimate fight against centuries of British occupation. This exception understandably upsets Mrs. Thatcher. After all, the Irish Republican Army came awfully close to blowing her to Kingdom Come.

Much as it may upset Mrs. Thatcher, she is as correct a target as the poor British conscripts she sends north to maintain British domination over a people who never have accepted it. She and her soldiers are just as legitimate a target as Oliver Cromwell or the Black and Tans.

It does not help to couch the exception in elegant language that speaks of Britain as a "democratic country" with a "fair legal system." Perhaps that's true for Englishmen in England. It is not true in Northern Ireland, a police state almost since the moment of its birth. Raids are made without warrants, trials are held out of public view without juries, interrogations are brutish and outside civilized law. The prisons are hellholes.

The grand old dame Britannia should hide her face in shame, even in the days when she had the greatest and fairest legal system on earth, there were different rules for the bloody colonials. They simply weren't considered as human as their oppressors.

If Congress approves Reagan's Supplementary Extradition Treaty, it means that even a rebel soldier who fights his way out of an ambush and kills another soldier anywhere the Union Jack flies will be considered a murderer by the United States and returned to one of Maggie's prisons. It's only a matter of time before the other things we have good relations with get the same break.

This isn't for governments to decide. It's a matter of fighting for freedom. Sometimes, as in the American Revolution against the very same Brits, it even requires violence.

Congress must tell the Chief Irish-American, the Glipper, who's dreaming of leprechauns and mumbling bogorahs, this is not just a little item of foreign policy between him and the current illegitimate ruler of Ireland.

U.S.-British treaty should be changed . . .

By Sen. Richard G. Lugar

Terrorism is a serious threat to American democratic interests in the world. The cornerstone of American foreign policy is the protection and promotion of democracy in the world. Democratic countries celebrate human rights, they enhance our security interests and they are good trading partners.

Terrorism is antidemocratic. It attempts to achieve by violence what it cannot achieve legitimately. Terrorism threatens our peace and security in the world. It also threatens the foundations of any democracy by taking political dissent and turning it to violent and often totalitarian design.

The Senate Foreign Relations Committee today will debate and vote on a controversial new anti-terrorism treaty. The treaty, which the Senate last year rejected by a two-thirds vote, drops the so-called political defense clause from the current extradition treaty between the United States and the United Kingdom.

The United States is proud of its history as a refuge for political dissidents in the world. We are a nation of immigrants who came here to seek freedom. The problem today is that terrorists can hide behind America's love for freedom and political dissent to escape prosecution.

This is a sensitive issue and members of the Senate Foreign Relations Committee have debated it accordingly. Protecting American civil liberties is of greatest priority, but I believe that to bar terrorists from prosecution by other democratic nations would do more harm to freedom and democracy than it would do to our country on its head.

The United States and the United Kingdom enjoy a special relationship in world affairs. Many from both nations have died fighting together to defend our mutual freedom and democracy. In the current fight against state-sponsored terrorism in the world,

each commits itself not to harbor terrorists against each other. This commitment has to be part of our democratic alliance.

In addition to the new extradition treaty with the United Kingdom, the United States has already signed similar treaties with the Netherlands, Mexico and Colombia. A new extradition treaty with West Germany has been initiated and will be considered soon by the Senate.

Sen. Jesse Helms (R., N.C.) has objected to the new extradition treaty with the United Kingdom on the grounds it might establish a precedent with communist totalitarian nations, who then would try to extradite various freedom fighters from the United States. To satisfy his concern, I have offered an amendment to the treaty that declares that the United States has long made a distinction in its foreign policy between democratic nations and totalitarian regimes. That is why we are not in NATO and not in the Warsaw Pact.

Helms also offered three other amendments to meet concerns made by members of the Foreign Relations Committee. These amendments tightening the language of the treaty, making it less vague on the question of protecting the civil rights of all persons residing in the United States.

Sen. Thomas Eagleton (D., Mo.) is concerned that the new treaty is unclear on the question of whether U.S. judges have the right to review a petition for extradition. He wants the United States to guard against political witch hunts. Consequently, I have offered two amendments.

The first states that American judges can review all extradition petitions submitted to the courts. The second states that the phrase "barring extradition" in the 1943 extradition treaty with Sweden.

The second amendment gives the

president the authority to make an exception on humanitarian grounds. It states that the president can deny extradition if he finds that the individual is being sought to prosecute him for his race, religion, nationality or political opinion.

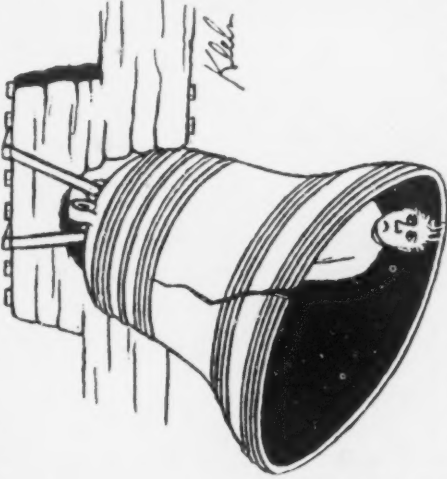
The third amendment deals with the definition of offenses that could not be used as a political defense. Several senators suggested an amendment that differentiates between criminal acts against civilians and uniformed officials.

I am strongly opposed to this amendment. It would mean that a terrorist rocket attack on British military base would be condoned by U.S. law. It would mean that the Libyan pilot who shot the female police officer in London last year could find refuge in the United States.

My amendment follows the line taken in the proposed new extradition treaty with West Germany. It lists murder, manslaughter, inflicting grievous bodily harm, kidnapping, abduction, hostage taking and use of explosives as offenses for which the political defense cannot be used. There is no difference in crimes against civilians and officials. This list excludes possession of firearms, an offense included in the proposed treaty.

The United States must combat both the causes and the effects of terrorism. We cannot tolerate state-sponsored terrorism. We must work with democratic allies to isolate terrorist states and, if necessary, to fight back. We must also work actively to protect and promote democratic institutions in the world so that political dissent can be heard in nonviolent ways. Ratifying the new extradition treaty with the United Kingdom has to be part of that effort.

(Sen. Richard G. Lugar (R., Ind.) is chairman of the Senate Foreign Relations Committee.)



been trying to extradite from the United States for prosecution several suspected IRA members charged with terrorist acts. Extradition has been blocked, however, because the suspects contend that their acts were political in nature.

Terrorism may be based on political frustration, but to condone and protect it for that reason is wrong. If the United States is to protect its democracy in a dangerous world, it should not be in the business of protecting terrorists against other democratic nations.

At the recent Tokyo summit, President Reagan signed a joint declaration expressing American support for a new Western agreement among the Western European democracies in which

the British have also stood with the United States.

Much of the conflict over the new extradition treaty between the United States and the United Kingdom results from the problem of Northern Ireland. All Americans and all British citizens, I believe, pray for the day when the sectarian violence in Northern Ireland is resolved. The Foreign Relations Committee also has before it an aid package to promote economic development in Northern Ireland, which I support.

A peaceful solution to the problems of Northern Ireland will not come through more violence, especially of the kind perpetuated by the terrorists of the Irish Republican Army. The British government has

Cherished tradition

... but the real issue is about political sanctuary

By Sen. Joseph R. Biden Jr.

In the wake of the U.S. raid on Libya, the debate over a new Supplementary Extradition Treaty between the United States and the United Kingdom has been portrayed as an argument over the merits of getting tough with terrorism. It is not.

Moreover, the issue that really is at stake has been almost totally ignored. The treaty, drafted by Britain to facilitate extradition of suspected British terrorists, is yet to be ratified by the full Senate. So far it has not won approval from the Foreign Relations Committee, where it remains mired in controversy.

In fact, it has been opposed by a majority of the committee and this majority is not only bipartisan but also represents the full range of the ideological spectrum: liberals, moderates and conservatives.

Coalitions of this kind are unusual in the Senate, but when they do occur, it is usually a sign that there is some kind of bedrock issue involved — a deep concern over some fundamental American tradition, principle or law — and that is precisely the case here.

From the beginning, the real issue — the only issue — in the debate over this treaty has been the impact of the treaty on the application of an important and longstanding principle of American jurisprudence called the political offense doctrine.

Translated into everyday language, the issue is this: The United States has a long and deeply cherished tradition of offering safe haven to individuals who are subject to persecution in their country, either because of religious or re-

cial prejudice or political activity. Many of us can point to forebears of ours who came to America for this reason.

In the case of individuals fleeing political persecution, we have a judicial process to safeguard the rights of those who are legitimate political refugees. The process provides that such individuals are subject to extradition only if a U.S. court, in an open hearing where all interested parties can make their case, finds that the offense with which the individual is charged is not political in nature.

The pending treaty would seriously undermine the protections currently afforded such individuals by putting them at the mercy of a much more capricious, arbitrary and politicized process.

It would do this by removing the judiciary from the decision-making process. Instead, it would make the State Department sole authority to decide each individual case behind closed doors, on whatever basis it deemed fit. In the real world, this means that individuals' rights could be bargained away for whatever diplomatic or military *quo pro quo* is important at the moment.

Thus, in the treaty opponents' judgment, has not been and should not be the American way of doing things. We also see no need for such a drastic change in procedure. While the administration and others characterize the supplementary treaty as an essential weapon in the fight against terrorism, the facts argue the contrary.

In the last 25 years of extradition practice with the United Kingdom, the United States has refused extra-

dition for political reasons in only three cases. And the British are conducting only one of these. Current extradition practice therefore hardly creates a situation that is inviting open season on British soldiers in Northern Ireland, as has been alleged.

For these reasons, those of us who opposed the treaty have offered a substitute. Unfortunately, this substitute has been given no hearing in the committee and deliberately misrepresented outside it by those who are bent on passing the treaty in its current form.

The substitute leaves the decision-making process where it belongs, in the hands of the courts. It also refines the political offense doctrine,

as thugs and murderers are a clear part of the record of our committee's hearings on the treaty.

The issue is whether America continues to remain a beacon of hope, a place of safe sanctuary for the oppressed peoples of the world, as it has been for two centuries. The proposed supplementary extradition treaty violates this cherished tradition which, ironically, was brought by British citizens to America. The substitute treaty that has been offered accomplishes the goal sought by treaty supporters, but keeps this tradition intact.

(Sen. Joseph R. Biden Jr., D., Del., is a member of the Senate Foreign Relations Committee.)



Op-ed by Senator John F. Kerry which appeared on June 2, 1986
in the The London Times

The U.S.-U.K. Extradition Treaty, presently pending before the Senate Committee on Foreign Relations, has generated considerable controversy and misinformation on both sides of the Atlantic.

The issue is whether or not an integral part of American law since 1843 should be overturned by an extradition treaty. Perhaps it is a conservative position to take, but I do not believe we should give up on our own law and judicial system so blithely as the Reagan Administration is proposing to do with this treaty.

For the first fifty years of our existence, the United States refused to engage in any extradition because of our lack of confidence in most foreign legal systems. When we did join in entering into extradition agreements with other nations, we did so on the condition that political offenders would not be surrendered to the legal systems of foreign nations. And to insure that such fugitives would not be surrendered, we wrote the political crimes defense into our treaties. As a further protection of individual rights, extradition was made a judicial function precisely to insure that persons under the protection of our laws could not be

surrendered to foreign regimes for political reasons. Ironically, the political crimes defense has been a shared tradition firmly rooted in Anglo-American extradition law.

It was not until 1981 that any American administration claimed that our courts lacked jurisdiction to grant the raising of this defense. This is the real issue being presently debated in the Committee on Foreign Relations. This has nothing to do with the Irish Republican Army. It has nothing to do with the fact that I represent a state with a sizeable Irish-American constituency. It has everything to do with American traditions of jurisprudence.

Yet, attempts have been made to impugn the motives of Senators who oppose the treaty in its present form by equating such opposition with support for the IRA in Northern Ireland and, by inference, with support for terrorism. This is the same as equating opposition to the Reagan Administration's contra policy in Central America with support for communism. More appropriately, this is the same as equating the Thatcher government's refusal to negotiate an extradition treaty with India as indicative of British support for Sikh terrorism and separatism.

The debate in the Senate Committee is not unlike the extradition law reforms presently pending in the British Parliament. As The Economist correctly pointed out on March 29, 1986 it is harder for foreigners to retrieve fugitives from Great Britain than it is for Britain to retrieve fugitives from most other nations. As was pointed out,

between 1979 and 1983, 35 percent of the 116 requests from non-Commonwealth countries to extradite a fugitive from Britain were refused.

The problem in finding the proper balance between the need to deal with the threat of international terrorism and the necessity for maintaining basic democratic traditions and individual safeguards poses a dilemma for both our nations. This concern was reflected in the February 1985 presentation to Parliament by the Home Secretary on extradition reform in which the Thatcher government emphasized that "it is generally accepted that persons accused or convicted of political crimes should not be extradited."

In addition, the Home Secretary's presentation pointed out that "it is a universally accepted principle of extradition that fugitives should be surrendered only for conduct which is against the law of both the requested and requesting parties."

Yet, neither of these principles to which the Thatcher government maintains are inviolate under extradition law (which was reiterated in Criminal Justice Plans for Legislation, Cmnd. 9658, March 1986), are reflected in the U.S.-U.K. Supplementary Treaty.

On April 1, 1986, Sir Geoffrey Howe, in refusing demands from the Indian Government to negotiate a new extradition treaty to deal with the Sikh extremist problem, emphasized that improvements in the Fugitive Offenders Act, which

governs extradition between Britain and members of the Commonwealth, would suffice.

Yet, the political crimes exception to extradition in the Fugitive Offenders Act is extraordinarily broad. In addition, under the Act, a British magistrate may deny extradition if he determines that it would be unjust or oppressive to return the fugitive to the requesting country. In other words, a determination is made as to whether or not the administration of justice system of the requesting state meets British standards.

This leads me to another concern of those of us who oppose the treaty in its present form. And that is the problem with the administration of justice system in Northern Ireland. As the National Council for Civil Liberties of Great Britain pointed out on September 16, 1985, Northern Ireland has been under emergency legislation continuously since 1922. The Council stated: "The emergency legislation has destroyed the basic safeguards developed over centuries in our legal system to protect the citizen from wrongful arrest, detention and conviction."

While it might be painful to raise the issue of the administration of justice system in Northern Ireland, I believe we have a responsibility to do so. Once again, this is entirely consistent with the traditional British approach to extradition.

Prime Minister Margaret Thatcher argues that the United States Senate owes her government a quid pro quo for allowing

F-111s stationed in Great Britain to participate in the Libyan bombing raid. Yet, the real issue is one of principle which goes far beyond our relationship with Great Britain or the situation in Northern Ireland. Has the maintenance of the political crimes defense in American extradition law created a haven for terrorists in the United States? Is the problem of such a grievous nature that it requires the elimination of a cherished American legal tradition? Obviously not, is the answer. Out of four American cases in recent years involving alleged IRA terrorists, three have been settled to the satisfaction of the British government. The fourth case, Joseph Doherty, is on appeal and he remains imprisoned.

Those of us who oppose the complete elimination of the political crimes doctrine from our system of American jurisprudence are indeed committed to an effective means for dealing with international terrorism. That is why we have offered substitute language to the administration's proposal which would narrow considerably the crimes for which a political crimes defense could be raised. Under our proposal, the courts could not exempt from extradition fugitives who commit crimes of violence such as aircraft hijacking, hostage-taking, kidnapping, armed attacks primarily directed against members of the civilian population, crimes against diplomats and heads of state, or the use of letter, parcel or car bombs.

We are continuing negotiations in an effort to find a proper balance between the need to deal with threats such as terrorism and the necessity for maintaining basic democratic institutions and individual safeguards. This is the balance that even the Thatcher government recognizes as the British Parliament debates reforms in your own extradition laws. While recommending the abolition of the *prima facie* requirement in extradition proceedings, your government has made it very clear there are other effective means by which the rights of the fugitive are protected including the maintenance of the double criminality rule and "the proper application of the political safeguard."

In Great Britain, the issue of extradition is being dealt with in the context of a Parliamentary debate over legislative reforms of the criminal justice system proposed by your government. The Thatcher government should accord the United States the same respect for our democratic institutions and processes as well. Any reforms in American law or the traditional manner of administering the law, should not be accomplished through a treaty with a foreign government.

Our Founding Fathers believed that the separation of powers between our three branches of government was the only safeguard against the abuses of a sovereign. Thus, when it comes to the treaty-making responsibilities of the Senate, we have a special duty to weigh potential agreements with other nations very carefully. The maintenance of the integrity of

our established democratic traditions and institutions, and the safeguarding of legitimate individual rights should be of paramount concern to us all. One can stop terrorism without trampling on a 143-year-old legal tradition by executive fiat.

Falling Into an Extradition Treaty Trap

By CHRISTOPHER H. PYLE

Contrary to the claims of the Reagan administration, the proposed Supplementary Extradition Treaty with the United Kingdom now before the Senate for ratification will not enhance the extradition of terrorists like the Irish Republican Army bombers who attacked Harrod's department store in London. They are already extraditable. Rather, the treaty could permit the extradition of genuine revolutionaries who fight, rightly or wrongly, to free their countries from British rule. It will apply not only to Northern Ireland, but to all British possessions throughout the world.

In demanding Senate approval of the Supplementary Treaty, the Reagan and Thatcher administrations claim that there is no difference between a disciplined rebel force with significant popular support that fights occupying soldiers according to the laws of war, and an isolated fringe group, like the Red Army Brigade, that enjoys no popular support as it guns down innocent travelers at a civilian airport.

It is precisely to preserve this distinction that a bipartisan group of senators opposes ratification of the treaty in its current form. The senators do not support the IRA, but they are trying to preserve "the political crimes defense" to extradition—which has been a nearly universal principle of international law for more than a century.

The administration is demanding "emergency" action to plug an alleged "loophole" in the current extradition law. Yet this "loophole" was invented by Thomas Jefferson, added to our treaties by

David Webster, and refined by John Stuenkel. Such senior and responsible senators as Orrin G. Hatch (R., Utah), Dennis DeConcini (R., Ariz.) and Alfonse M. D'Amato (R., N.Y.) think the administration took a wrong turn on this one.

Rather than ink their rubber-stamps and win immediate praise for "taking a stand against terrorism," these senators held hearings to learn more about the treaty. They heard not from spokesmen for the IRA, but from the nation's leading authorities on the law of extradition. The more the senators learned about the treaty and about the administration's five-year campaign to strip the courts of authority to shield from extradition political fugitives from any country, including some of the worst dictatorships on earth, the more opposed they became. They saw the treaty, quite rightly, as one stratagem in a much larger campaign to reduce the extradition of human beings to a mere instrument of foreign policy.

These senators do not object to helping British Prime Minister Margaret Thatcher combat terrorism. They do object to any treaty that would treat ordinary rebels (or deposed government officials) as mere criminals to be surrendered to the very regimes they fought against in a bitter struggle for power. The senators see nothing wrong with recent court decisions that have developed a "wanton crimes exception" to the political crimes defense. They believe that the courts acted responsibly when they sent a Palestinian back to Israel for planning a bomb in a civilian marketplace, shielded an IRA member for shoot-

ing a British soldier during a fire-fight between two squads in Belfast, but surrendered an IRA member for sending letter bombs through the mails in London.

But the Reagan and Thatcher administrations are not satisfied with the wanton crimes exception. They would have us believe that any rebellion against an allegedly "democratic country" with "a fair legal system" can never be justified. If they are right, of course, then rebellions against British rule in the American colonies, southern Ireland, and Israel could not have been justified, for at the time of each of these revolts, mother England was more democratic and had a fairer legal system than most other nations on earth. She just wasn't sufficiently democratic and fair to her outlying possessions to warrant their continued loyalty and affection.

Contrary to administration claims, Northern Ireland is not a democracy. It is a police-run statelet within the U.K., and has been since the first emergency legislation was enacted in 1922. Northern Ireland is patrolled by British Army troops and a paramilitary police force for a host of reasons only partially attributable to the IRA. The British there are beset by two revolutions, one by the IRA, and another by Unionist paramilitary units. The Unionist revolt more often lies dormant, choosing to strike only when the British appear to help the Roman Catholics or move toward a more extenuated administration of the law. Given these two rebellions, and the British tendency to view Northern Ireland primarily as a military problem, it should come as no surprise that institutions of local democracy have not developed there, and that the administration of justice is still marred by wanton raids on private homes, overbearing interrogations, juryless trials and cruel prisons. No wonder, too, that rebels against these conditions sometimes flee to the U.S.

Under the American law of extradition, the judge must decide whether a rebel sought for extradition is a terrorist or not. The proposed treaty would strip the courts of this power. Instead, the State Department would decide which rebels will be called "freedom fighters" and shielded, and which will be called "terrorists" and delivered to the regime they fought to overthrow. The courts would become mere paper-pushers, checking the extradition requests for plausible claims of probable cause that violence had been committed. (The Reagan administration has even tried, by legislation, to abolish the probable cause standard as an unnecessary impediment to combating crime and terrorism.)

Under current law, each political fugitive charged with a crime against a foreign power is entitled to a judicial hearing at which the legality of his extradition will be determined on the basis of what he, and he alone, is alleged to have done. What members of his rebel organization may have done is not relevant in our courts of law; all that matters is what he is alleged to have done, because ours is a system of individual justice.

The U.K. treaty would destroy this principle. It would start us back down the road to the medieval law of extradition, when political fugitives were surrendered by executive action for reasons of state. Let us not let our legitimate fear of terrorism lead us into actions we may later regret.

Mr. Pyle teaches constitutional law at Mount Holyoke College and is writing a book on extradition and U.S. law.

Wall Street Journal

5/22/86

page 30

cal 3

Keep extradition treaty as is

With the appearance of a payoff to the Thatcher government for allowing Air Force F-111s to fly out of Britain for the April 15 strike on Libya, the Reagan administration has renewed efforts to drop the political exception in the U.S.-British extradition treaty. Such deals are precisely why the political exception should not be dropped.

The treaty provides now that American courts decide whether refugees in the United States should be given political status. There are two cases outstanding: In one involving William Quinn, accused of mailing letter bombs from America to people in Britain, the Ninth Circuit Court of Appeals decided for extradition; in the other, involving Joseph P. Doherty, who was convicted of killing a British Army captain in a shootout in Ulster and later escaped from a Belfast prison, the Second Circuit Court of Appeals has refused extradition.

America has a long tradition of providing refuge for political dissidents, going back to early colonial times. Much of that tradition, of course, was brought here by British citizens.

If the Reagan administration, urged on by a British diplomatic blitz, gets its way, the power of bureaucrats to decide extradition issues would be strengthened considerably. Extradition decisions would be decided

largely not in open courts but by government bureaucrats behind closed doors. The danger is that extradition may be decided by bargaining that has nothing to do with the merits of each case but rather by diplomatic or military quid pro quo — such as the Libyan raid.

The matter is before the U.S. Senate Foreign Relations Committee. Any change in the treaty would have to be approved by two-thirds of the Senate. Unfortunately, Foreign Relations Committee chairman Richard J. Lugar (R., Ind.) has chosen to link the treaty issue with U.S. aid to Northern Ireland (which is the kind of deal that very well would be made with people's rights if the political exception is taken out of the treaty). The committee should vote on the two matters separately.

Sens. Joseph R. Biden Jr. (D., Del.), Thomas F. Eagleton (D., Mo.) and Claiborne Pell (D., R.I.) want a distinction drawn between terroristic attacks on civilians and assaults on military targets. Nevertheless, those who come to this country claiming political protection should be allowed to do so in open procedures in U.S. courts without diplomatic wheeling and dealing, on entirely separate issues, influencing the outcome.

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EDITORIALS

Extradition Treaty Flawed

"One man's terrorist is another man's freedom fighter." So goes the aphorism some use to justify acts of violence against established governments. U.S. Sen. Christopher J. Dodd has come perilously close to agreeing with that, and both he and the Senate, which is debating a new extradition treaty with Great Britain, ought to examine carefully the implications of such a belief.

The British and the Reagan administration are backing a treaty that would make it easier to extradite suspected terrorists from one country to another. Under the current treaty, signed in 1972, a U.S. magistrate must deny a request for extradition if a person would be put on trial in Great Britain for a political offense. Judges have wide discretion in determining what is and is not a political offense.

Under the new treaty, a whole series of crimes would be removed from the political-offense exemption. Most disturbingly, the decision about whether to allow extradition would be taken from the courts. There apparently would be no avenue for review of a British request for extradition. If the treaty is ratified, the United States would be obliged to turn over to the British any person Britain suspects of a non-political offense.

A compromise version, backed by opponents of the administration's proposal, would maintain the power of the courts to review requests for extradition. It would also distinguish between acts of violence directed against civilians, which would be grounds for extradition, and acts of violence directed against military targets, which judges could

rule were grounds for denial of extradition. We favor maintaining the power of the courts to review extradition requests, but oppose erecting the distinction between acts of violence.

Mr. Dodd seems to favor the distinction: "If you go after a military barracks, I'm not sure, ipso facto, that it should be considered a terrorist act," he says. Apparently he thinks that an Irish guerrilla who targets British military bases and then flees to the United States should be offered asylum, whereas those who target civilians should not. The reasoning is threadbare.

Whether one blows up a British tank or detonates a bomb in downtown London, both are acts of violence. How can the United States and Great Britain maintain normal diplomatic relations if the United States is willing to harbor those who use violence against the British government? Imagine the reaction in this country if Britain were to offer asylum to someone who was suspected of detonating a bomb at the Groton submarine base.

The distinction between civilian and military targets is not convincing. An act of violence loses none of its capacity to inspire terror just because it leaves a young army officer, rather than a young mother, lying dead. To support the distinction is to support violence, and who except terrorists can favor that?

The courts should be allowed to determine whether a request for extradition is valid. But it would be wrong to refuse to extradite a person suspected of using violence against military installations or personnel.

Hard to Stomach, But Right

Baltimore News American

5th May '82

From their point of view it's understandable that the British, having given the president the OK to send American planes based in England on the Libya mission, are so upset with the reluctance of Congress to authorize a treaty for the extradition of IRA terrorists who escape to the United States after committing crimes in Northern Ireland or England. Some members of Congress from states with large Irish-American populations are in opposition, and not to their credit, simply out of fear of angering Irish-American constituents. But there is a far better reason to oppose the treaty.

For well over a century — indeed, for almost as long as this country has existed — the United States has refused to extradite foreign nationals for crimes, even terrible and frightful crimes, that they demonstrably have committed for political reasons in their own countries. This, of course, is the sticking point. The British hold that an IRA member who bombs a pub (or blows up a boat and kills a revered figure such as Lord Mountbatten) is a killer pure and simple. But if it can be shown that a bomber

The British hold that an IRA member who bombs a pub is a killer pure and simple. But if it can be shown that a bomber or murderer acted to further the IRA's goal of forcing the British out of Northern Ireland, his crime, in this country's eyes, falls under what is called the political offense exception of extradition law.

or murderer acted to further the IRA's goal of forcing the British out of Northern Ireland, his crime, in this country's eyes, falls under what is called the political offense exception of extradition law.

The tradition exists, obviously, to prevent state persecution of extradited foreigners for their political beliefs, and is thus basic to American concepts of freedom. It is also a tradition, we grant you, often very hard to stomach, given for example the atrocities committed by the

Tempting though it may be for the United States to ship home foreigners sought in their own countries for politically motivated crimes — IRA terrorists, for example — American law traditionally has prevented their extradition, and for reasons basic to this nation.

Hard to stomach or not, it is wise.

The Reagan administration, which backs the proposed American-British extradition treaty, also supports a country-by-country approach — meaning that when the administration *likes* a country and adjudges it to be "stable," it is perfectly willing to send back those foreigners sought for politically inspired crimes in that country. But remember that the Philippines was considered "stable" under Ferdinand Marcos, which means that conceivably the administration could have extradited Benigno Aquino and could ship home a Korean whose crime was committed out of opposition to his repressive government.

What is a political crime and what is not? The difficulty of answering that question in many cases adds to the confusion and uncertainty and agony of trying to make the right decision after a man who broke his own nation's laws escapes to the United States and gets caught here. American law as it pertains to extradition needs clarification and uniformity, but it will be a long time in coming. Indeed it will not come during the Reagan administration. A bill proposed a couple of years ago by Rep. William J. Hughes, D-N.J., to treat all the world's nations the same in matters of extradition was opposed, and remains opposed, by both the State and Justice departments. To put it more accurately, neither department is interested.

Given the state of the world today — given terrorism particularly — it is tempting to make it easier for other nations to nail criminals no matter what their motivation. And tempting not even to think about the American tradition of non-extradition. But shipping IRA thugs to the British opens the door to handing over opponents of repressive govern-

The Cleveland (Ohio) Plain Dealer,
May 5, 1986

Extraditing IRA killers

The Senate is considering an updated extradition treaty with Britain that would make it more difficult for Irish terrorists to find sanctuary in this country. It is tempting to support the treaty for several reasons. Among them:

- To reward British Prime Minister Margaret Thatcher for letting U.S. planes raid Libya from British bases.

- To dissociate the United States from those citizens who give support to a movement that kills and maims soldiers, police and civilians.

- But sound though those aims might be to many Americans, they are not sufficient to justify the removal of a fundamental protection for political activists seeking a haven in the United States.

If the Senate approves the new treaty—which was signed last June—suspected or convicted terrorists being sought by either country for serious crimes of violence would lose the right to offer political motivation as a defense. Obviously, the treaty would apply to domestic terrorists who happened to flee to Britain; but some of its most zealous opponents argue that it is mainly a device to help Britain in its long-running campaign to contain the Irish Republican Army.

That in itself is not a deplorable consequence. Many Americans simply do not buy the proposition that the IRA is an admirable group of freedom fighters analogous to George Washington and his followers. The IRA has proven links with Libya and other sponsors of international terrorism. According to the Reagan administration, the new treaty is intended as a major step in an expanded crusade to curb worldwide terrorism.

- If, as the administration expects in the aftermath of the strike against Libya, the British treaty is adopted, there will be efforts to negotiate similar pacts with other "stable democracies," including France, West Germany and Israel. In each case, the political defense would be eliminated.

- It is easy to understand why the British are eager

to strike down that provision. In 1984, in a notorious example of justice gone astray, a federal judge in New York City ruled that Joseph Doherty, the convicted killer of a British soldier, met the definition of a political offender under terms of the treaty. A British appeal failed to reverse the decision.

But one questionable ruling is not sufficient argument against retention of the political defense. Even in the New York case, the judge made a distinction between assaults on civilian targets and those on military ones. Had Doherty bombed a department store, for instance, the British could have had him back.

Doherty still may be deported for violating immigration laws. The problem with that option, critics say, is that the deportee may name a country he or she wishes to go to, but if the country declines to accept, the United States can't force the person to leave.

Clearly, securing the return of a suspected or convicted terrorist requires solid legal work. It also can be time-consuming. And decisions like the one in New York test one's faith in the entire system. But the framers of the original treaty obviously foresaw that there might be cases where even alleged terrorists could argue persuasively against extradition. To remove that civil libertarian plank might even be construed as a victory for terrorists, as they try to panic democratic governments into eroding human rights.

The treaty needs a two-thirds majority vote to clear the Senate. It may fall short of the necessary votes because of opposition from the Irish-American lobby. It is unfortunate that at least some of that antagonism is based on wrongheaded support for a terrorist organization, rather than concern for an important principle. That principle will be served by retaining the existing treaty and its protective clause. Meanwhile, the IRA and similar organizations should not be deceived into miscalculating the extent of their support in this country.

Senate Debate on Terrorism in Northern Ireland Entangles U.S.-British Treaty on Extraditions

By DAVID SHRIEMAN

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—Is a rocket attack on a British military installation in Northern Ireland less of a terrorist act than the bombing of a Belfast theater or airport lounge?

Democrats on the Senate Foreign Relations Committee, which is examining a U.S.-British extradition treaty, say there is a difference and want U.S. law to treat the rocket attackers more leniently. Republicans argue that the distinction is, as Sen. Rudy Boschwitz of Minnesota puts it, "ridiculous."

The result is an unusually complex domestic issue wrapped up in an even more delicate matter of foreign policy. Coming at a time when political leaders of both parties are cheering a strong stand against terrorist activities and when the U.S. government is pressing its vigilance against terrorism on its allies, the issue is seriously dividing lawmakers on Capitol Hill and is leaving Britain deeply troubled.

This bitter dispute resumes Wednesday, only a week after the industrialized nations committed themselves in Tokyo to cooperate against terrorism. It centers on efforts by Democrats—with an unusual GOP ally, Sen. Jesse Helms of North Carolina—to protect from automatic extradition those charged with mounting attacks on British military officials and installations in Northern Ireland.

Defining Terrorist Acts

"If you go after a military barracks," says Sen. Christopher Dodd (D., Conn.), a leader in the effort to make adjustments in the U.S.-British treaty, "I'm not sure, ipso facto, that it should be considered a terrorist act."

At stake is not only an extradition treaty that British officials consider a "very high priority." Also at issue are a U.S. aid package to Northern Ireland, the sensitivities of millions of Irish-American voters and America's historic role as a haven for political dissidents.

In principle, there is little debate on the need for diplomatic tools to speed the extradition of suspected terrorists for trial. But some factions of the Irish-American lobby and Democrats like Sen. Dodd and Sen. Joseph Biden of Delaware are drawing a distinction between violent attacks that endanger the lives of civilians and civil inspections that include attacks upon military officials and installations.

They agree that suspects charged with impending civilians ought to be extradited swiftly, as the treaty requires. The others,

they believe, ought to be permitted at least a chance to argue in court that they deserve protection as political dissidents, a right cherished by generations of Americans.

That distinction has prompted derision from Republicans, who have vowed that a U.S. aid package now awaiting Congressional approval won't advance until the extradition treaty is approved by the Senate. Sen. Richard Lugar (R., Ind.), chairman of the Foreign Relations panel, sees the aid package and the extradition treaty as "complementary policy vehicles" to curb instability in Northern Ireland.

Moreover, Sen. Paul Trible (R., Va.), who has charged that the Democrats' objections to the extradition treaty are "based on Irish politics in the U.S.," has threatened a filibuster unless the two measures win approval together.

But Sen. Helms worries that the principles of the extradition treaty could be applied against rebel forces in Nicaragua and Afghanistan, groups mounting attacks against established governments. "This is one time when I think the Democrats are

exactly right," says Mr. Helms. "It occurs occasionally."

The Reagan administration has mounted a lobbying offensive of its own, arguing that the adjustments the Democrats want to make would "gut" the treaty and, according to Abraham Sofaer, the State Department's legal adviser, "declare open season" on military personnel.

At the same time, the British government of Margaret Thatcher—which permitted the U.S. to use F-111s based in Britain to attack Libya and worked at the Tokyo summit to assure a tough statement on terrorism—is stepping up its own efforts. The British, in fact, describe the extradition treaty as a test of U.S. resolve against terrorism. "There's absolutely no point in just talking about fighting terrorism," says Bernard Ingham, a spokesman for Prime Minister Thatcher. "If the U.S. is serious, the first thing it can do is pass extradition legislation."

From the start, the debate on the treaty, negotiated a year ago, has been conducted in an unusually emotional atmosphere.

But now serious negotiations are under way; the Democrats are tinkering with their proposal, seeking to assure that suspects involved in hijackings, hostage-taking and letter, parcel and car bombings be excluded from claiming they are engaged in political activities.

British-Irish Accord

Meanwhile, debate continues on the U.S. aid to Northern Ireland, which is de-

signed to support the accord the British and Irish signed in a castle in Hillsborough, Northern Ireland, last November. The accord, intended to promote stability in the six counties, calls for international support to rebuild the economy in areas hardest hit by sectarian violence.

The Reagan administration called for \$250 million in cash and credits over five years but the House, in its zeal to assist Ireland, approved \$250 million in cash alone. Sen. Edward Kennedy (D., Mass.)

introduced a similar proposal, titling it the "Thomas P. O'Neill Jr. Aid to Ireland and Northern Ireland Act of 1986."

But Senate leaders are balking at the size of the U.S. contribution. "We support the process," says Chairman Lugar, "but we have to wrestle with how much money is available."

ROSTRUM

Senator Joseph R. Biden, Jr.

A 'bad law' on terrorists

Our national desire to deal strongly with terrorism could lead us into a serious mistake if a supplementary extradition treaty between the U.S. and Britain is ratified.

Now before the Senate Foreign Relations Committee, the treaty is being advertised as part of the worldwide battle against terrorists—in this case, members of the Provisional Irish Republican Army. It would allow return of criminal terrorists arrested in the U.S. for prosecution in Britain.

With its slogan of "an Armalite (rifle) in one hand and a ballot ticket in the other," the Provisional IRA is clearly a very different group from the heroes of the 1916 Easter Uprising.

Support for the treaty, such as that in your editorial [November 25], is understandable. But it is important to look beyond our national reaction to terrorism and toward our own best interests. Already rejected outright by eight Western European nations, it is seriously flawed in several respects:

- It is not a comprehensive attempt to deal with terrorism and has nothing to do with those who murdered Robert Stethem, Leon Klinghoffer and many others.
- It would, at best, affect two suspected Provisional IRA members already behind bars in the U.S. who cannot expect release anyway.
- The treaty negotiators, in their zeal, cast its language far too broadly. As a result, Americans who contribute to an Irish charity that is legally registered in the U.S. could be jailed in Belfast and charged with "conspiracy to cause an explosion."
- The treaty process itself is the wrong way to solve a problem that is rooted in domestic law. If we start renegotiating the 96 extradition treaties we now have, terrorists will rule the earth before we ever finish the job. We need legislation to insure that no terrorist could claim protection under the political-offense doctrine for an act of cold-blooded murder.
- The slow treaty-by-treaty approach permits each administration to draw up its own list of who is a "terrorist" and who is a "freedom fighter."

In the last 25 years, only four extradition requests from Britain have been refused because of the political-offense doctrine. Those were admittedly hard cases on which good citizens might well disagree. But 81 years ago, Justice Holmes opined that hard cases make bad law. This treaty, based on two more hard cases, is another example of bad law.



Joseph R. Biden, Jr. (D-Del.) was elected to the U.S. Senate in 1972. He is a member of the Foreign Relations Committee.

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Human Rights—in Northern Ireland

The Post, an advocate of human rights in foreign policy, seems not to have kept that standard in mind when examining the extradition treaty amendments now before Congress. The Post's Editorial [Nov. 3] treats the treaty as a simple transfer from one jurisdiction to another, both of which have essentially the same standards of judicial procedure, as though one were extraditing a parolee from, say, New York to Michigan!

Northern Ireland, to which accused might be extradited under the terms of this treaty, has been governed by emergency legislation since it was established as separate from the Irish Republic in 1922. The law stands at the will of Parliament. The Emergency Provisions Act of 1978, combined with "The Prevention of Terrorism Act of 1984," is the law and judicial procedure by which someone who has sought political asylum in the United States would be extradited. The law is not *arbitrary* under constitutional limitations. It could be changed tomorrow—made better, or worse.

As it now stands, the law places the burden of proof on the accused. The right to stand trial by jury is removed.

The right of habeas corpus is scarcely recognized, and the right to immediate access to lawyers is denied. Evidence gained before consultation with counsel is admitted and uncorroborated evidence from accomplices or informers is admissible. Other practices are tolerated that do not meet American standards of due process or equal protection under the law. It would be strangely contradictory that in a time when the United States is making respect for human rights and civil rights central to its foreign policy in many parts of the world, it would, with reference to this treaty, be indifferent to that wider commitment.

The security of England is not endangered by the existing extradition treaty between England and the United States. There is no pressing, practical reason, and no reason of principle, to make it easier to deliver Irish persons seeking political asylum in the United States to the lawlessness of British law and to the judicial procedures in force in Northern Ireland.

EDWARD J. MCCARTHY

The writer is a former Democratic senator from Mississippi.

(From the New York Times, Wednesday, April 30, 1986)

Congress

*The War on Terrorism,
From Tripoli to Belfast*

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, April 29 — One of the unexpected ripple effects of the confrontation this month with Libya may be Senate approval of a treaty that would make it easier for the United States to send suspected terrorists from Northern Ireland back to face British prosecution.

An updated British-American extradition treaty, languishing for months in the Senate Foreign Relations Committee, has taken on new life and may come to a committee vote as early as Thursday.

The treaty, signed by the two Governments 10 months ago, would substantially limit the circumstances under which acts of violence may be treated as "political offenses" exempt from extradition. The current extradition treaty with Britain, like treaties in force between the United States and dozens of other countries, bars extradition for offenses of a "political character."

The updated treaty has been blocked by Democrats on the Foreign Relations Committee who question the state of civil liberties in Northern Ireland and argue that the new treaty could make the United States a party to suppressing political dissent in that bloodily contested region.

"One person's terrorist is someone else's freedom fighter," Senator John F. Kerry of Massachusetts observed at a hearing on the treaty last summer.

The Theme of the Moment

But the battle against terrorism is the theme of the moment on Capitol Hill.

The treaty opponents' public stance has not changed, although some Democratic aides admit privately that it is politically awkward these days to stand in the way of a measure portrayed as a weapon in the war against terrorism.

Just as defeating the treaty has become a cause célèbre in some Irish-American communities, its approval has received the highest priority from Prime Minister Margaret Thatcher.

In a radio interview Sunday with the BBC, Mrs. Thatcher said that the aid Britain provided for the American mission against Libya gave the United States a particular obligation to help Britain in its fight against "Irish terrorism."

"If you're fighting terrorism, you can't fight it just on one front and not another," the Prime Minister said.

Echoing that theme, a State Department spokesman, Charles Radman, urged the Senate on Monday to reciprocate for Britain's allowing

American planes to take off from bases in England by "demonstrating our willingness to support the British on an issue of terrorism of primary importance to them."

The fate of the treaty is by no means certain, even if it clears the Foreign Relations Committee. It needs a two-thirds vote of approval by the entire Senate.

But the explicit link with the Libyan situation has given the treaty a new momentum, as one of its strongest opponents, Senator Joseph R. Biden Jr. of Delaware, somewhat ruefully conceded today.

Mrs. Thatcher's remarks "enhance to some degree the politics of the British appeal," Mr. Biden said in an interview. "It's one of those things that people will use."

Mark Helmke, a spokesman for



Agence France Press

Senator Richard Lugar backs a new extradition treaty with Britain.



United Press International

Senator Joseph Biden is one of the strongest opponents of it.

Senator Richard G. Lugar, the Indiana Republican who heads the Foreign Relations Committee and supports the treaty, said, "This issue was a sleeper for a long time."

"It looked easy to kill when no one was looking," Mr. Helmke said. "All of a sudden, people are starting to pay attention. Suddenly it's bigger than ethnic politics."

The outlook is complicated by several factors, including an escalation of the time-honored Congressional practice of holding one measure hostage to another.

The treaty has become entwined with a \$250 million aid package for industrial development in Northern Ireland proposed by the Reagan Administration and adopted last month in an enhanced form by the House of Representatives.

Public Security and Individual Freedom: The Dilemma of Northern Ireland

Thomas P. Foley†

Northern Ireland has been the scene of recurring and often horrifying violence since 1969, as terrorist groups have clashed with each other, with the British Army, and with the Royal Ulster Constabulary (RUC). The situation has been a difficult one for both the people and the legal system of Northern Ireland. The British government has had to confront dedicated terrorists, the British government has had to protect public security and its respect the tension between its duty to protect public security and its concomitant obligation to safeguard individual freedom. This Article focuses on the British government's most recent legislative response to this tension, the Emergency Provisions Act (EPA),¹ and appraises its success in accommodating the competing demands of public safety and private liberty.

The EPA cannot be assessed without some understanding of the historical background of the current situation and of the different sources of the violence wracking Northern Ireland. Section I of the Article is intended to provide this information in capsule form. Section II explains the operation of the EPA, with particular attention to its breadth and to its potentially counterproductive effects. The standards for the admissibility of confessions to crimes covered by the EPA and the lack of procedures for the independent investigation and evaluation of complaints against the security forces are analyzed in detail in Sections III and IV, respectively. In Section V, the Article concludes with recommendations for legal reform that would establish a better balance between the need for public security and the need for legal protection against excessive or unnecessary intrusions on individual freedom.

1. Origin and Nature of the Present Conflict

British control of all of Ireland was consolidated in the sixteenth cen-

† J.D. Yale University, 1982.
1. Emergency Provisions Act, 1978, ch. 5. The first version of the EPA was enacted in 1971. See Northern Ireland (Emergency Provisions) Act, 1973, ch. 53. Unless otherwise indicated, all citations in this Article are to the 1978 EPA.

Northern Ireland

tury,² and maintained for hundreds of years thereafter despite repeated insurrections by Irish desirous of breaking the link that had been established by force of arms.³ The Government of Ireland Act, passed by the British Parliament in 1920,⁴ formally partitioned northern and southern Ireland by establishing separate parliaments of limited powers for each.⁵ The northern entity, composed of six counties within the province of Ulster, became Northern Ireland, and has remained continuously within the British domain.⁶ Under the terms of the Anglo-Irish Treaty of 1921,⁷ the southern entity, composed of the remaining twenty-six counties of Ireland, became in 1922 the Irish Free State.⁸ Today it is the Republic of Ireland, which is completely independent of Great Britain.⁹

The demographic fact that helped shape the creation of Northern Ireland and that remains basic to the situation is that approximately 65% of the population are Protestants,¹⁰ the descendants of seventeenth-century Scottish and English colonists,¹¹ whose religion¹² and history differ from those of the Catholic minority. The Republic of Ireland, on the other hand, has a predominantly Catholic population,¹³ and a constitution that until recently conferred on the Catholic church a special role in national affairs,¹⁴ and that still outlaws divorce.¹⁵

2. See Hayes-McCoy, *The Tudor Conquest (1534-1603)*, in *The Course of Irish History* 134 (T. Moody & F. Martin eds. 1967).

3. The history of Ireland includes R. Edwards, *An Atlas of Irish History* (1973); J. Boyce, *The History of Ireland* (1971); and T. Moody, *The History of Ireland* (1973). See also T. Moody & F. Martin eds. 1967; T. Moody, *The Ulster Question 1603-1973* (1974); L. De Poser, *Divided Ulster* (1973).

4. See McCann, *From Parnell to Parnell (1891-1921)*, in *The Course of Irish History*, supra note 3, at 294, 311-12.

5. Government of Ireland Act, 1920, 30 & 31 Geo. 5, ch. 67, see R. Hull, *The Irish Traveller in Northern Ireland* 34 (1976).

6. R. Hull, *op. cit.* supra note 5, at 34.

7. See Treaty, Dec. 6, 1921, Great Britain-Ireland, 26 L.N.T.S. 10.

8. See Irish Free State (Agreement) Act, 1922, 12 Geo. 5, ch. 4.

9. See R. Hull, supra note 5, at 19-21. Great Britain formally recognized this independence with the passage of the Ireland Act of 1949. Ireland Act, 1949, 12, 13 & 14 Geo. 6, ch. 41.

10. IRELAND, A CHRONOLOGY AND FACT BOOK 143 (W. Griffin ed. and compiler 1973) [hereinafter *IRELAND*].

11. See Clarke, *The Colonization of Ulster and the Rebirth of 1601/1602/1603*, in *The Course of Irish History*, supra note 3, at 189.

12. It should be noted that Protestantism in Northern Ireland is not monolithic; it embraces many separate sects. See FACT BOOK, supra note 10, at 143.

13. Data collected in 1961 indicated that about 90% of the population was Catholic. *Id.* This figure may actually underestimate the percentage of Catholics, for intermarriage during the past several decades has tended to favor Protestants. See Clarke, *op. cit.* supra note 11.

14. See *These Irish Ever Free? Living and a Family* (Day Fourth, April 1, 1, 15, 1981) at 26, col. 3.

15. BUNREACT NA HEIRLEANN (Constitution of Ireland), arts. 44.2, 3 (repealed 1972); 15 *Id.* art. 41.2.2.

Great Britain partitioned Ireland ostensibly to guarantee that the Protestants in the North would be ensured political power in their own state despite the existence of the over-whelming Catholic majority in the South.¹⁶ The demographic consequence of this partition, however, was to create a Catholic minority in Northern Ireland that itself has been without political power. This demographic and political dilemma—whether the Protestants in the North should be a minority as compared with the Catholics throughout Ireland, or whether the Catholics in the North should be a minority as compared with the Protestants there—heretofore has proven insoluble.

While the conflict in Northern Ireland is often described as one pitting the Protestant majority against the Catholic minority, this strictly religious characterization obscures the true nature of the conflict. The term "Protestant" describes that part of the population which traces its lineage to the seventeenth-century colonists, and which is largely Protestant, while the term "Catholic" describes the native Irish, who have been predominantly Catholic since the fifth century. To the extent that these sectarian labels imply that the conflict is a "religious war," that Protestants are attacked because they attend a Protestant church, and that Catholics are attacked because they attend a Catholic one, they are misleading. Rather, the conflict should be understood as one between the Unionists, or Loyalists, who wish to maintain the state of union with Great Britain as a link to their heritage, and the Nationalists, or the more militant Republicans, who wish to reconstitute an undivided Ireland as a link to their heritage. Two related issues—the preservation of historical and cultural ties, whether to Great Britain or to Ireland, and the fact that political power may depend on which ties are preserved—have inspired the violence, not religious beliefs per se.¹⁷ The historical division between Unionist and Nationalist, and therefore be-

16. See R. HILL, *supra* note 3, at 55-56.

17. As described by The Times of London, [there are] several commonalities in Northern Ireland, different in their origins, serving different historical myths. Protestants are seen as the bearers of the British Empire, the heroes, and wearing different denominations of the same religion is the clearest badge of these differences. But the conflict is not about religion. It is about the assertion of two distinct communities, one of which is dominant in the public affairs of the province.

The Times (London), Aug. 30, 1969, at 7 col. 1 (editorial) (emphasis in the original). This article is significant in that "sectarian" murders—ones committed against an individual known to be of a different religious faith—have not occurred. The important point is that the victims in such murders are likely to have been chosen for their religious faith. They are not the victims of political aspirations of their assassins. Politics in many cases has religious overtones, in that the religious elements play some role, and the religious labels often are used for the sake of convenience. Some Unionist factions, however, do stress the "ethnic" or Catholicism. See P. MARRIOTT, *FAIR PLAY FOR NORTHERN IRELAND* (1973).

Northern Ireland

tween Protestant and Catholic, rendered even more acute by years of discrimination against the minority, has made Northern Ireland fertile ground for violence and civil unrest.

The Unionist Party, closely connected through much of its existence to the often violently anti-Catholic Orange Order,¹⁸ governed Northern Ireland without interruption until 1972,¹⁹ when the imposition of direct rule from Westminster effectively suspended parliamentary government within Northern Ireland.²⁰ It is now admitted that during this period discrimination against the Catholic minority was widespread in housing, employment, and the administration of justice.²¹

Progress toward equality of opportunity in housing²² and employment²³ has been made, but true economic equality between majority and minority has not yet been realized.²⁴ The burdens of inequality have been complicated by the fact that Northern Ireland generally is much poorer than the rest of the United Kingdom.²⁵ Attempts to remedy inequalities have been handicapped during the last decade by economic decline, a continuing violence and the problems in the British and world economies have combined to deter new industry from locating in Northern Ireland and to persuade some existing firms to close or

18. W. FLACKS, *NORTHERN IRELAND, A POLITICAL DIRECTORY, 1966-1976*, at 103 (1980).

19. T. MOORE, *supra* note 3, at 32, 48.

20. Northern Ireland (Temporary Provisions) Act, 1972, ch. 22 (authorization of direct rule); The Northern Ireland (Temporary Provisions) Order, 1972, 280-310 (1972).

21. See T. MOORE, *supra* note 3, at 23-25 (general discussion of discrimination); Fair Employment Agency for Northern Ireland and Occupational Profiles of the Two Sectors of the Population in Northern Ireland (1978) (general discussion of employment discrimination); R. MILLER, *ON PATRIOTISM, MOBILITY OF PROTESTANTS AND ROMAN CATHOLICS IN NORTHERN IRELAND* (1979) (structural discrimination in occupational patterns); K. BOYLE, T. HODGINS & P. HOLLAND, *Law and State: The Case of Northern Ireland*, chs. 2, 7 (1975) (discrimination in housing).

22. Public housing is now being provided on the basis of objective criteria, which has reduced significantly concern about discriminatory awards. Housing remains a serious problem, however, as 14.1% of the housing stock is classified as unfit for human habitation, compared with 4.6% for England and Wales. Rowthorn, *Northern Ireland: an economy in crisis* 3 (Cambridge U. Press 1981).

23. The Fair Employment Agency, which was established to monitor public and private employment, has been successful in obtaining the recipients of government contracts to hold equal opportunity certificates, which the agency has been successful in obtaining from employers with their terms. See Fair Employment Agency for Northern Ireland, *Sixty Reports and Settlements of Accounts* 4-5, 10-12 (1982).

24. Rowthorn, *supra* note 22, at 8-10, 18-22. This study found that "in many people continue to live in real poverty and deprivation—especially Catholics, who remain lower paid, more poorly housed, and more prone to unemployment than Protestants." *Id.* at 13. The study also found that "the level of unemployment in Northern Ireland was substantially lower than that of the United Kingdom, although important groups have been hit by unemployment since then, average earnings remain lower, and unemployment higher than in the United Kingdom as a whole." *Id.* at 14-16.

which has directed an assassination campaign against representatives of the British Army, the R.U.C., the Ulster Defence Regiment (U.D.R.—a kind of National Guard composed of volunteers from Northern Ireland), and their respective reserves.⁴³ The Provisional I.R.A. also has killed politicians, judges, prison employees, and members of other terrorist groups, as well as hundreds of unintended victims.⁴⁴ A second group, the Irish National Liberation Army (I.N.L.A.) is the military wing of the Irish Republican Socialist Party.⁴⁵ It too wages a military battle, sometimes with terrifying success,⁴⁶ but its membership is apparently less numerous than that of the Provisional I.R.A.⁴⁷

Loyalist terrorist activity seems motivated by fears of a possible union with the Republic of Ireland and by anger at what is perceived to be violence directed against the Protestant and Loyalist majority community. This activity has been aimed primarily at Catholics, through intimidation of families living in mixed areas and attacks on Catholic pubs and individuals.⁴⁸ Just as different Republic factions have engaged in internecine strife, Loyalist groups occasionally have attacked each other, although their differences appear to concern territorial control and racketeering more than differences in political and military strategy.⁴⁹

There are two major Loyalist terrorist organizations. The Ulster Volunteer Force (U.V.F.) originated in the early twentieth century in response to the "threat" posed by an independent Ireland, but then largely disappeared after the partition of Ireland.⁵⁰ A group claiming its name and heritage emerged violently in the 1960s, and was declared illegal in 1966.⁵¹ This proscription was lifted briefly in 1974, when the

in Northern Ireland which, it believes, would lead eventually to union with the Irish Republic. See W. FLACKER, *supra* note 18, at 111-20.

43. See T. COOGAN, *The I.R.A.* 461-81 (1980).

44. *Id.* See also *supra* notes 39-41.

45. See W. FLACKER, *supra* note 18, at 72.

46. The group claimed responsibility for the March, 1979 assassination of Airey Neave, M.P. Coogan attributed the killing to the Ulster Volunteer Force, the Ulster Defence Regiment, and the Ulster Loyalist Volunteer Force. See T. COOGAN, *supra* note 43, at 112-13. Neave was killed by a 160 lb. bomb which exploded in a car in which he was sitting. The explosion also left 16 people dead and 29 seriously injured. *Week Post*, Dec. 8, 1982, at A2R, col. 3.

47. See K. BOYLE, T. HADGREN & P. HILLIARD, *Ten Years On In Northern Ireland, 1969-1979* (1980) [hereinafter *Ten Years On*]. It is easily, but not necessarily correctly, assumed that Loyalist terrorists are more "sectarian" than their more "political" Republican counterparts. Though the political motivation is probably a function of the nature of the conflict, Republican terrorists can just as easily be seen as religious fanatics who are symbols of the conflict, as Loyalist targets are more obviously "sectarian." *Id.*

48. See W. FLACKER, *supra* note 18, at 111-20.

49. M. DILLON & D. LEWANE, *POLITICAL MURDER IN NORTHERN IRELAND* 28 (1973).

50. *Id.* at 28-35.

Northern Ireland

U.V.F. undertook a short-lived political action campaign.⁵² It soon reverted to terrorism, however, and was banned again under the terms of the EPA.⁵³

The second, and much larger, Loyalist organization, is the Ulster Defence Association (U.D.A.). Founded in 1971 to coordinate opposition to the I.R.A. among various Protestant groups,⁵⁴ it has recruited large numbers of working class Protestants from all over Northern Ireland.⁵⁵ Its initial purpose was to demonstrate the strength of opposition in Northern Ireland to a united island, and to that end it organized intensive and disciplined public military maneuvers.⁵⁶ It changed its position in 1977 and campaigned politically for the creation of a Northern Ireland independent of Great Britain and the Irish Republic.⁵⁷ In 1981, however, during a hunger strike by Republican prisoners, the U.D.A. abandoned the approach and returned to its Loyalist position.⁵⁸ While the U.D.A. has never been proscribed, it has played a major role in the intimidation of Catholics, and few doubt that some of its members have been involved in assassination and bombing.⁵⁹

The final action in this military drama are the government forces, which include some 30,000 members of the British Army and the R.U.C.,⁶⁰ and who patrol a country of 1.5 million inhabitants.⁶¹ These troops are ostensibly assisted in their efforts to maintain order by the existence of emergency legislation, the scope and effects of which this Article is intended to analyze.

II. The EPA: Protection of Public Security at the Expense of Individual Freedom

Adopted in 1973 following the recommendation of a British government commission chaired by Lord Diplock,⁶² the EPA has remained

52. W. FLACKER, *supra* note 18, at 147.

53. *Id.* at 138-39.

54. *Id.* at 118.

55. *Id.* at 139.

56. *Id.* at 140-41.

57. *Id.* at 140-41.

58. *Id.* at 140-41.

59. *Id.* at 140-41.

60. *Id.* at 140-41.

61. *Id.* at 140-41.

62. *Id.* at 140-41.

63. *Id.* at 140-41.

64. *Id.* at 140-41.

65. *Id.* at 140-41.

66. *Id.* at 140-41.

67. *Id.* at 140-41.

68. *Id.* at 140-41.

69. *Id.* at 140-41.

70. *Id.* at 140-41.

71. *Id.* at 140-41.

72. *Id.* at 140-41.

73. *Id.* at 140-41.

74. *Id.* at 140-41.

75. *Id.* at 140-41.

76. *Id.* at 140-41.

77. *Id.* at 140-41.

78. *Id.* at 140-41.

79. *Id.* at 140-41.

80. *Id.* at 140-41.

81. *Id.* at 140-41.

82. *Id.* at 140-41.

fundamentally unaltered since its enactment. A government committee, chaired by Lord Gardiner and appointed in 1974 to assess the anti-terrorist measures in the context of human rights and civil liberties, recommended some important changes,⁶³ but essentially the EPA was left intact. Sixteen semi-annual reviews of the EPA undertaken by the British Parliament have resulted in only one major change: the power of internment, which originally could be invoked at the discretion of the Secretary of State, can now be invoked only with parliamentary approval.⁶⁴ At each review, the British government has recommended continuation of the EPA,⁶⁵ and Parliament has appeared willing to accept this recommendation virtually automatically.⁶⁶ A small but vocal minority (about 20 of the approximately 670 members of Parliament) has consistently criticized the invasions of individual freedom permitted under the EPA,⁶⁷ but it received no widespread support, at least during the first fourteen renewal debates.⁶⁸

While the application of the EPA is confined to Northern Ireland,⁶⁹ its scope within the province is far-reaching. The Act applies primarily to "scheduled offenses,"⁷⁰ which generally constitute "terrorist" crimes such as arson, kidnapping, use of explosives, and hijacking.⁷¹ It established special police and judicial procedures to be used in the investiga-

Special Powers Act, EPA, 1973, ch. 53, § 31(2). It should be understood as the latest version of the emergency laws that have been in effect in Northern Ireland since its establishment. See *supra* notes 26-33 and accompanying text.

63. See REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND, CMD. 5, 30, 34-7 (1975) (Lord Gardiner, Chairman) [hereinafter GARDINER REPORT]. The Gardiner Report recommended that the government should consider the possibility of continuing to abandon internment in favor of the trial of suspected terrorists in criminal courts. See *id.* at para. 146, at 43, *supra* note 105 and accompanying text. The Report also recommended that Parliament reaffirm judicial discretion to exclude the admission into evidence of statements made under questionable circumstances. GARDINER REPORT, *supra*, para. 50, at 17. The recommendation was not adopted. See *supra* notes 161-65 and accompanying text.

64. See Northern Ireland (Emergency Provisions) Act 1978 (Continuance) Order, 1980 Stat. Inst. No. 1049.

65. See, e.g., 559 P.A.L. Deb., H.C. (5th ser.) 1499-1500 (1978) (statement of Roy Mason, Secretary of State for Northern Ireland); 949 P.A.L. Deb., H.C. (5th ser.) 931-35 (1979) (statement of Humphrey Adams, Secretary of State for Northern Ireland).

66. See, e.g., 949 P.A.L. Deb., H.C. (5th ser.) 925-1066 (1979) (parliamentary debate on continuation of the EPA); 559 P.A.L. Deb., H.C. (5th ser.) 1499-1506 (1978) (same).

67. See, e.g., 559 P.A.L. Deb., H.C. (5th ser.) 1539 (1978) (statement of Tom Lister, M.P. for Birmingham); 949 P.A.L. Deb., H.C. (5th ser.) 944 (1979) (statement of Bryanor Jones, M.P. for Penryn).

68. See *supra* notes 81-82 and accompanying text.

69. EPA § 3(2).

70. *Id.* § 30, subd. 4.

71. *Id.*

Northern Ireland

tion and trial of scheduled offenses.⁷² It permits arrest and search without warrant of those suspected of "committing, having committed, or being about to commit" offenses covered by the EPA,⁷³ and makes it illegal for those witnessing or having knowledge of terrorist incidents to refuse to cooperate with the authorities.⁷⁴ Persons suspected of being terrorists may be arrested without warrant and detained for up to seventy-two hours.⁷⁵ Moreover, its extraordinary powers are not limited to scheduled offenses. British troops are permitted to arrest and detain temporarily without charge or warrant any individual suspected of any crime.⁷⁶ The EPA also creates new categories of crimes, such as wearing hoods in public,⁷⁷ and retains many features of earlier emergency laws.⁷⁸ Given this scope, the conclusion that the EPA has touched the lives of many thousands of people in Northern Ireland is inescapable. British government officials have acknowledged the wide sweep of the EPA as well as its intrusive character. Marilyn Keen, a former Secretary of State for Northern Ireland, described its scope as follows:

- all terrorist type offenses to be categorized as "scheduled offenses";
- trials of scheduled offenses to be by a senior judge, sitting alone (no right to a jury trial), but with more than usual rights of appeal;
- bail in scheduled cases to be given only by the High Court (rather than by a magistrate) and then only if stringent precautions were made;
- the arrest without warrant and detention by the police for up to 72 hours of any person suspected of being a terrorist . . .
- the arrest and detention of a suspect [for any offense] for up to four hours by members of the Army;
- wide powers of search and seizure by members of the security forces;
- reversal of the normal onus of proof in relation to offenses of possession of arms and explosives.

72. See, e.g., *id.* § 2 (special conditions for bail), *id.* § 6 (special courts for trial of scheduled offenses), *id.* § 7 (no jury trials of scheduled offenses).

73. *Id.* §§ 13, 14.

74. Section 18 of the EPA provides that "any member of Her Majesty's forces on duty or any constable may stop and question any person for the purpose of ascertaining whether or not he is a person suspected of committing, having committed, or being about to commit, any offence under this Act, and may search him, and may require him to furnish any recent explanation or other information, and may detain him for a reasonable period of time, if he has reasonable grounds for suspecting that the person is a person suspected of committing, having committed, or being about to commit, any offence under this Act." *Id.* § 18.

75. *Id.* § 13. Other anti-terrorist legislation permits the detention of suspected terrorists for periods up to seven days. Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8, § 12(2).

76. *Id.* § 14(1).

77. *Id.* § 26.

78. For example, section 21 of the EPA prohibits membership in proscribed organizations. *Id.* § 21. This offense is also defined under regulations issued pursuant to the Prevention of Terrorism (Temporary Provisions) Act, 1976. See, e.g., *supra* note 31 and accompanying text. Both the Provisional IRA and the UVF are proscribed. EPA § 21, subd. 2.

—a fresh system of detention by the executive.⁷⁹

Acknowledging the severity of the measure at the time of its enactment, then Secretary of State William Whitelaw declared that "[t]he Bill contains some features unpalatable to a democratic society. Her Majesty's government does not disguise the fact that it imposes serious limitations on the traditional liberty of the subject."⁸⁰

The bipartisan consensus that had supported automatic continuation of the EPA broke down in 1981, when the British Labour Party supported a motion introduced in Parliament that called for a broad investigation of the operation of the Act.⁸¹ In analyzing the emergence of opposition to the EPA, it may be noted that the Act has generated two distinct but related concerns: (1) that the EPA must be scrutinized because it contemplates intolerable violations of individual rights, and (2) that the EPA, when considered instrumentally, must be judged a failure because its counterproductive effects—the possible swelling of terrorist ranks, and the erosion of respect for law and order—fuel the very crisis that the EPA was intended to quell.⁸²

Regarding the first concern, while it is undeniable that the right to live in the most basic human right, and that the right to live without fear of death or grievous bodily injury is almost equally central, it seems undeniable that the government's responsibility to protect individual freedom has been seriously compromised under the emergency regime. Military forces are virtually omnipresent.⁸³ Almost 300,000 warrantless home searches were authorized between 1971 and June, 1978.⁸⁴ These home searches occurred at an average rate of about ninety per day.⁸⁵ Between 1972 and 1978 more than 25,000 persons were arrested and detained for periods ranging from four hours to

79. *Rees, Terror in Ireland—and Britain's Response*, in *BRITISH PERSPECTIVES ON TERRORISM* 83, 84 (P. Wilkinson ed. 1981).

80. *PEACE PEOPLE: THE CALL FOR THE REPLACEMENT OF THE EMERGENCY PROVISIONS ACT BY NORMAL JUDICIAL PROCESS* 3 (n.d.) (quoting William Whitelaw) (on file with *The Yale Journal of World Public Order*).

81. *THE IRISH PRESS*, *DAILY*, H.C. (6th ser.) 1032-46 (1981). The motion was defeated by a vote of 276 to 213.

82. J. Don Concurs as follows: M.P. and former Minister of State for Northern Ireland, articulating these concerns as follows: [w]hile we fully accept the need to protect the community against terrorism, we are deeply concerned about the erosion of basic civil liberties. The continued and unreviewed emergency powers as they stand may impede the possibilities of a peaceful settlement.

Id. at 1040.

83. *See* *supra* note 60 and accompanying text.

84. *PEACE PEOPLE: THE CALL FOR THE REPLACEMENT OF THE EMERGENCY PROVISIONS ACT BY NORMAL JUDICIAL PROCESS* 3 (n.d.) (quoting William Whitelaw) (on file with *The Yale Journal of World Public Order*) [hereinafter *Time for a Change*].

85. *Id.*

Northern Ireland

seven days.⁸⁶ Of those detained between September, 1977 and August, 1978, only about 35% were ultimately charged with an offense.⁸⁷ In the first ten months of 1980, 3,868 persons were arrested by the police and army under the EPA.⁸⁸ A mere 8.6% of those arrested were eventually prosecuted,⁸⁹ compared with an 80 to 90% average for those arrested in England and Wales.⁹⁰

Important as this immediate concern for human rights may be, it can be argued that the second concern—that the EPA produces longterm counterproductive effects—is even more fundamental. If the EPA creates resentment, drives people into the terrorist groups, and undermines basic respect for the rule of law across Northern Ireland, it may be exacerbating the violence it was designed to combat and making it even more difficult to achieve a definitive resolution of the situation that would guarantee public security and basic individual freedom.

With respect to the relationship between the EPA and the recruitment of terrorists, it seems plausible that the incursions into homes through search and seizure and the arrest and detention of persons without warrant or charge may encourage the involvement of young people in the violence. It should be noted that the current violence is largely the product of young people who have grown up since the beginning of the most recent period of terror. Two-thirds of those serving prison terms longer than four years were under fifteen years of age when the current emergency began; one-third were under nine.⁹¹ Northern Ireland, which formerly had the lowest per capita prison population in Western Europe, now has the highest and youngest.⁹² More-

86. *TIME FOR A CHANGE* *supra* note 84, at 9.

87. *See* REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, H.C. (6th ser.) 3, No. 7497 (1979) (His House H.O. 100) [hereinafter *Report*].

88. 945 *PARL. DEB.*, H.C. (5th ser.) 271, 405-06 (1980) (response of Humphrey Atkins, Secretary of State, to written parliamentary question no. 49).

89. *Id.* Given that as few as those detained under the EPA are ever charged with an offense, concern has arisen that the provisions of the EPA are not being used to investigate terrorist incidents, but rather to compile information about individuals and areas which cause nuisance. One recent survey found that 72% of a geographically and socioeconomically diverse sample of Northern Ireland residents had been involved in specific incidents at all. *See* D. Walsh, *Arrest and Interrogation*, NORTHERN IRELAND 1981 (1981) (on file with *The Yale Journal of World Public Order*).

90. *See* ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, Cmd. 5, No. 8002, para. 3.17, at 63, para. 4.43, at 83 (1981).

91. NORTHERN IRELAND OFFICE, THE CORMYMELE CONFERENCE (OCTOBER 1979) ON PRISONS IN NORTHERN IRELAND, 1980 (DUBLIN, WITH SPECIAL REFERENCE TO THE LOST TROUBLES 13) (CHIEF OF PRISONS, NORTHERN IRELAND) (on file with *The Yale Journal of World Public Order*).

92. *The Peace People: The H-Block Protest*, HINDER STRAUS AND EMERGENCY LAW 7 (1980) (on file with *The Yale Journal of World Public Order*).

over, one study of the backgrounds of terrorists has concluded that most I.R.A. operations are carried out by recent recruits whose backgrounds make them representative members of the working class Catholic communities in which they live.⁹³ In short, many of the terrorists at work are typical members of a younger generation that has grown up with violence and with the extreme measures taken to curtail it.

While the history and traditions of the Catholic communities in Northern Ireland ensure substantial resentment of British security forces and justice,⁹⁴ the process by which this general resentment is translated in individual cases into active support of a terrorist group is not clear. Perhaps the internment of a relative without trial or the destruction of property during a pre-dawn house search, or harassment on a local street might be sufficient to push a Catholic youth into membership in the youth wing of the Provisional I.R.A. But even given this uncertainty, the potential effects of the searches permitted under the EPA on terrorist recruitment is enormous. If only 2% of the 600 families whose homes were searched each week between 1970 and 1978 produced terrorist volunteers, the Provisional I.R.A. could have afforded a complete turnover every year in its corps of 500 active duty volunteers.⁹⁵

The second pernicious effect of the EPA is that it may be undermining the respect for law and order necessary for a peaceful long-term solution to the crisis. This danger was recognized nine years ago in the Gardiner Report, which noted that the basic strategy of the terrorists was to provoke governmental reactions that would destroy the popular support that the government would otherwise enjoy.⁹⁶ It also noted that short-time measures might restore order, but that long-term solutions required popular support.⁹⁷ Unfortunately, these warnings do not appear to have been heeded, as the government, at least since the pas-

93. Boyle, Madden & Hilliard, *Emergency Powers: Ten Years On*, FORTNIGHT, Jan. 1980, at 4. The authors based their conclusions on their systematic review of the record in cases adjudicated by the courts of Northern Ireland in 1975 and 1979. See also *True For Chance*, *supra* note 84, at 9-10.

94. See *supra* notes 27-34 and accompanying text.
95. A recent paper of the British Ministry of Defence estimated that the Provisional I.R.A. had 500 "active" members. MINISTRY OF DEFENCE, *NORTHERN IRELAND: FURTHER TERRORIST TRENDS*, at G-1 (Dec. 15, 1978) (on file with *The Yale Journal of World Public Order*). A copy of the report was diverted and made public. The numerical strength of terrorist groups is, for obvious reasons, difficult to estimate accurately.

96. GARDINER REPORT, *supra* note 63, para. 17, at 7. For a discussion of this strategy generally, see R. CLUTTERBUCK, *LIVING WITH TERRORISM* 17 (1975); P. WILKINSON, *THE BOMBING OF THE LIBERAL STATE* 66 (1977).

97. GARDINER REPORT, *supra* note 63, para. 19, at 7.

sage of the EPA, has focused almost exclusively on imposing repressive measures, and not on building a long-term consensus.

Even accepting the primacy of the EPA's short-term goal—the suppression of violence—the EPA must be adjudged a failure, because violence continues to wrack Northern Ireland.⁹⁸ Because the Act has failed to stop the terror, the population has lost confidence and has grown angry at the legal system, which has deprived individuals of basic civil liberties without offering any compensating increase in personal security. While the issue is not susceptible to quantitative analysis—for obvious reasons the participants are unwilling to speak—it seems plausible that as this loss of confidence and anger grow, the net effect of the EPA may be to produce more violence, not less.

The loss of respect for law is a dangerous development in any country, but especially so in Northern Ireland, where history guarantees a long and deep popular memory of civil strife.⁹⁹ Decision-makers should assess carefully whether measures implemented for short-term gains are outweighed by less tangible but more dangerous long-term consequences. While some form of emergency law will probably continue in Northern Ireland, further reliance on the deprivation of liberty demonstrates that the government itself is not fully committed to the rule of law as the appropriate vehicle to preserve public order. Thus, so long as the current crisis lasts, the daily impact of emergency law must be tempered by respect for the equitable administration of justice.

III. Admissibility Standards

A detailed analysis of the admissibility standards created under the EPA suggests strongly that the EPA should be reformed to make inadmissible as evidence statements obtained from persons interrogated under suspicious circumstances.

Section 8 of the EPA provides that any statement made by the accused during the investigation of a scheduled offense is admissible unless the accused can present "prima facie evidence" that he or she was "subjected to torture, inhuman or degrading treatment" for the purpose of inducing a statement.¹⁰⁰ This new standard represents a substantial

98. See *supra* notes 193-96 and accompanying text.

99. *See* *supra* notes 63-64 and accompanying text.

100. Section 8 of the EPA (formerly section 6) provides that:

- (1) In any criminal proceedings for a scheduled offence, or two or more offences which are or include scheduled offences, a statement made by the accused may be given in evidence by the prosecution in so far as—
- (a) it is relevant to any matter in issue in the proceedings; and
- (b) it is not excluded by the court in pursuance of subsection (2) below

erosion of the traditional common law principle of voluntariness, under which a statement was admissible only if offered freely.¹⁰¹ The new standard is also dangerously vague, because it leaves uncertain how much abuse constitutes "inhuman or degrading treatment."¹⁰² This issue is of more than academic concern. Permitting the security forces to mistreat prisoners to the point of "torture, inhuman or degrading treatment" has ensured that this provision of the EPA would generate enormous tension and controversy.¹⁰³ Finally, reflecting the standard's vagueness, the courts of Northern Ireland have proven incapable of interpreting it in a coherent fashion.¹⁰⁴ These factors make a powerful argument that the standard should be fundamentally changed.

A. The Controversy

Since 1975 the anti-terrorist strategy of the British government has been to eschew internment, in which detainees were held up to four years without charge or trial, in favor of the pursuit of convictions in the courts.¹⁰⁵ Those accused of terrorist offenses have been tried by special non-jury "Diplock Courts" created by the EPA in 1975.¹⁰⁶ The

- (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused has been subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained—
- exclude the statement; or
 - if the statement has been received in evidence, either—
 - disallow the trial disallowing the statement; or
 - direct that the trial shall be resumed before a differently constituted court (before which the statement in question shall be inadmissible).

(3) This section does not apply to a summary trial.

- EPA § 8 (emphasis added).
101. See *myra* notes 136-37 and accompanying text.
 102. See *myra* notes 184-88 and accompanying text.
 103. See *myra* notes 116-27 and accompanying text.
 104. See *myra* notes 144-79 and accompanying text.
 105. Internment, which had been the official strategy since 1971, proved counterproductive. See R. BRYCE, T. HADDOCK & P. HILL/ARD, *myra* note 21, at 55-77. In the four months following the implementation of the new strategy in 1971, the number of murders increased twelvefold over the number committed in the previous four months. SUNDAY TIMES HERGOT TEAM, GARDINER REPORT, *myra* note 65, para. 148, at 43. Its criticism helped persuade the government to change strategy. *THE YEARS ON, myra* note 48, at 24.
 106. Nearly 2,000 people, including only 107 Protestants, were interned without trial for varying periods of time between August, 1971 and December, 1975. N.Y. TIMES, Dec. 6, 1975, at 1, col. 1, at col. 2. The new standard of voluntariness is null on the books. EPA § 12, schd. 1, but it can be invoked only with reluctance. See *myra* note 64 and accompanying text. It has not been used since 1975. *THE YEARS ON, myra* note 48, at 24. The government continues to retain and to use its significant powers of temporary detention. EPA §§ 11, 14, see *myra* notes 75, 86 and accompanying text.

106. The courts are loathers by the name of the chairman of the commission that recom-

Northern Ireland

hope of the government has been that the return to the rule of law—symbolized by the end of internment—would alleviate the deep-seated mistrust of the legal system prevalent in the Catholic community.¹⁰⁷ The basic problem with this hope has been that the emergency regime of the EPA, despite the suspension of internment, cannot be viewed as normal law.¹⁰⁸

In particular, section 8, by removing the common law test of voluntariness in the admissibility of confessions, has caused major changes in traditional police and legal procedure. At the police level, a shift has occurred from pre-arrest acquisition of independent evidence to post-arrest interrogation as the primary tool of gathering evidence.¹⁰⁹ At the trial level, a shift has occurred from the jury's determination of the accused's guilt or innocence to judicial rulings on the admissibility of the accused's confession¹¹⁰—rulings that, given the reliance on confessions, are practically dispositive of the question of guilt or innocence. During 1976 and 1977, the two years after internment was abandoned, 3,147 persons were charged with scheduled offenses under the EPA.¹¹¹ A conviction was obtained in 94% of these cases, a figure not in itself alarming.¹¹² However, between 70 and 90% of these convictions were based wholly or mainly on admissions made to the police and held admissible by the courts under section 8.¹¹³ At the same time, the number of complaints of ill treatment during interrogation increased from 180 in 1975 to 384 in 1976,¹¹⁴ and almost 1100 for 1977 and 1978 combined.¹¹⁵

mented their establishment. See DIPLOCK REPORT, *myra* note 62, at paras. 33-41, at 17-19. Among their special features are the lack of jury trial, EPA § 7, and the reversal of the burden of proof in bail proceedings and trial of possession offenses. EPA §§ 2, 9, and a total exclusion of the operation of Diplock Courts, see *THE YEARS ON, myra* note 48, at 37-48.

107. See *THE YEARS ON, myra* note 48, at 102.

108. See *myra* notes 69-80 and accompanying text.

109. *Grat. The Admissibility of Confessions (Under the Northern Ireland Emergency Provisions) Act*, 31 N. Ir. L.Q. 205, 208 (1980).

110. *Id.*

111. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND 2 (1978) (AI Index EUR 45/01/78) (reporting data supplied by the RUC).

112. *Sunday Times* (London), Oct. 23, 1977, at 3, col. 1 (reporting research of the Law Department, Queen's University, Belfast).

113. *Id.* Research on the evidence used against defendants in Diplock trials between January and April, 1979 indicates that in 56% of the cases a statement from the defendant was the only evidence, in 30% of the cases the evidence consisted of the defendant's statement and other evidence, in 6% of the cases no statement was made, and in 8% of the cases the nature of the evidence could not be determined. *THE YEARS ON, myra* note 48, at 44.

115. *THE YEARS ON, myra* note 48, at 102.

115. *THE YEARS ON, myra* note 48, at 102.

The opening of special police interrogation centers at Castlebaragh and Gough Army Barracks was accompanied by large increases in the number of complaints of ill treatment during interrogation made against the police.¹¹⁶ Such complaints were made by the Northern Ireland Civil Rights Association, by representatives of the mainly Catholic Social Democratic and Labour Party,¹¹⁷ by the Catholic Church,¹¹⁸ and by solicitors defending alleged terrorists in the Diplock Courts.¹¹⁹ The Ulster Defence Association and the Loyalist-oriented Ulster Civil Liberties Advice Center also complained,¹²⁰ which indicates that the perception of ill treatment was not confined to the Catholic community. The wave of complaints received widespread publicity through two national television documentaries.¹²¹ Finally, after the Police Surgeons Association began to speak out,¹²² and Amnesty International issued a damning report about the situation,¹²³ the government appointed a Committee of Inquiry into Police Interrogation Procedures in Northern Ireland—the Bennett Committee.¹²⁴

The Bennett Committee was not empowered to investigate individual complaints, as could Amnesty International,¹²⁵ but nevertheless in its March 1979 report it found that there were cases "in which injuries, whatever their precise cause, were not self-inflicted and were sustained in police custody."¹²⁶ The Committee's report contained sixty-four findings and recommendations designed to improve the supervision of interrogation and to eliminate the possibility of further abuses.¹²⁷ These recommendations included installing closed-circuit T.V. in all interview rooms,¹²⁸ limiting the length of interviews and the number of

116. TEN YEARS ON, *supra* note 48, at 39; *see generally* P. TAYLOR, BEATING THE TERRORISTS' INTERROGATION IN GOUGH AND CASTLEBARAGH ch. 7 (treatment at Castlebaragh) & ch. 12 (treatment at Gough).

117. *See* AMNESTY INTERNATIONAL, *supra* note 111, at 3 (complaints of Northern Irish Rights Association and Social Democratic and Labour Party).

118. *See* *Statement of the Catholic Church*, *supra* note 118, at 1 (complaints of Archbishop of Armagh).

119. *See* *Report of the Committee of Inquiry into Police Interrogation Procedures* (1979) (hereinafter "Bennett Report").

120. *See* *Report of the Ulster Civil Liberties Advice Center* (1979) (hereinafter "Ulster Report").

121. *See* P. TAYLOR, *supra* note 116, at 163-64 (March 1977 BBC broadcast of interview with a man who had been convicted of terrorism); *see also* *Report of the Committee of Inquiry into Police Interrogation Procedures* (1979) (hereinafter "Bennett Report").

122. *See* *Report of the Police Surgeons Association* (1979) (hereinafter "Police Surgeons Report").

123. *See* AMNESTY INTERNATIONAL, *supra* note 111, at 3 (report of twenty-eight to have significant physical injuries).

124. *See* BENNETT REPORT, *supra* note 121, at 1.

125. *See* AMNESTY INTERNATIONAL, *supra* note 111, at 3.

126. *See* BENNETT REPORT, *supra* note 121, at 1.

127. *See* BENNETT REPORT, *supra* note 121, at 1.

128. *See* BENNETT REPORT, *supra* note 121, at 1.

Northern Ireland

interviewers,¹²⁹ promulgating a formal code of conduct for interviewers,¹³⁰ and granting an absolute right of access to a solicitor after a person had been detained forty-eight hours in custody.¹³¹ The government has formally accepted most of these recommendations,¹³² though questions have been raised as to whether that commitment has been honored fully in practice.¹³³ But even accepting that improvements were made as a result of the Bennett Committee report, the basic difficulties created by the section 8 legal standard remain.

B. Legal Debate: Standards Old and New

The Diplock Commission, whose recommendations guided the drafting of the EPA,¹³⁴ believed that the then prevailing common law standard regarding the admissibility of confessions so favored the defendant in Northern Ireland that in the struggle against terrorism the authorities were being forced to rely on the detention of suspected terrorists and not on their trial in courts of law.¹³⁵ The necessary implication of the Commission's judgment was that to foster a return to the rule of law symbolized by judicial trials, it was necessary to suspend an important legal protection—the principle of voluntariness in the admissibility of confessions.

The principle of voluntariness, operative throughout the United Kingdom before the enactment of the EPA, was deeply established in the common law.¹³⁶ It is well summarized in an official R.U.C. manual that describes the law of evidence outside the context of the EPA: "The

129. *See* *supra* note 62, at 137.

130. *See* *supra* note 62, at 137.

131. *See* *supra* note 62, at 137.

132. *See* *supra* note 62, at 137.

133. *See* *supra* note 62, at 137.

134. *See* *supra* note 62, at 137.

135. *See* *supra* note 62, at 137.

136. *See* *supra* note 62, at 137.

137. *See* *supra* note 62, at 137.

138. *See* *supra* note 62, at 137.

139. *See* *supra* note 62, at 137.

140. *See* *supra* note 62, at 137.

141. *See* *supra* note 62, at 137.

142. *See* *supra* note 62, at 137.

143. *See* *supra* note 62, at 137.

144. *See* *supra* note 62, at 137.

accepted test of voluntariness is in these terms:—"The confession must not have been induced by threat of prejudice or detriment or hope of advantage of a temporal character held out by a person in authority, or by oppression."¹³⁷ The Diplock Commission recommended that the law be changed so that in trials of scheduled offenses confessions obtained in violation of the principle might still be admissible.¹³⁸ Its proposed substitute rule, derived from Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹³⁹ was to make statements admissible unless "torture or . . . inhuman or degrading treatment" was used to induce them.¹⁴⁰ This suggestion, adopted in what is now section 8 of the EPA,¹⁴¹ represented a sharp and obvious departure from the principle of voluntariness.

1. *Non-physical Force Atmosphere—Flaws in the Diplock Commission's Approach to Interrogation*

The Diplock Commission clearly foresaw that the new admissibility standard would permit interrogators to use psychological pressure to induce confessions. It stated that the proposed standard would permit the creation of a psychological atmosphere in which the person being

Id. at 877.

This venerable doctrine still plays an important role in British criminal law. See *Director of Public Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175 (House of Lords). In this case a driver's license was suspended after a finding that any hint of inducement in the questioning of the defendant had been overcome by three specific refusals by the police to make a deal. The language of the opinion is consistent with the principle of voluntariness in virtually the same language as had been used in the *Franklin* case of some sixty years before. *Id.* at 175.

The voluntariness test has also been accepted by the courts of Northern Ireland in deciding cases outside the context of the EPA. See *Regan v. Corry*, 1968 N.I.R. 193 (I.C.C.A.). The court found admissible statements made by the defendant after questioning by the police. Although the court expressed no disapproval of the allegations of oppressive harsh, or misleading interrogation, the court voted in favor of the principle of voluntariness. "Aggravated cross-examination" might have been enough to render the admission involuntary.

The effect of a vigorous cross-examination or . . . of a series of searching interrogations on one who is not free to get away from his questioner may in other circumstances be to arouse hope of release or fear of further detention or other prejudicial result in the mind of the suspect according to whether or not he makes answers or keeps silent. It is also more directly by subjecting the person questioned to a degree of pressure which is not so great as to make him talk. We think such pressure may well suffice to make statements obtained by it inadmissible as proof of fact.

Id. at 211.

137. *R. MATTHEW, EVIDENCE IN CRIMINAL CASES* 21 (1978).

138. *DIPLOCK REPORT*, *supra* note 62, para. 89, at 32.

139. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, 213 U.N.T.S. 221. *DIPLOCK REPORT*, *supra* note 62, para. 90, at 32. Article 3 is not an absolute prohibition per se; rather, it flatly prohibits the use of "torture, inhuman or degrading treatment."

140. *DIPLOCK REPORT*, *supra* note 62, para. 89, at 32.

141. See *supra* note 139.

questioned would be more willing to speak, and, furthermore, that in creating this atmosphere the use of "promises of favours" and "indications of [unfavorable] consequences" to induce statements was allowed.¹⁴² The common law standard excluding statements made in "hope of advantage" or under "threat of detriment" thus was clearly rejected. The Commission believed that modern techniques of interrogation, which seek to create in the suspect the desire to confide in the questioner, do "not involve cruel or degrading treatment."¹⁴³ The actual or threatened use of violence, however, was to continue to render a confession inadmissible.¹⁴⁴

At the Castlebaragh and Gough interrogation centers, both of which have been designed to intensify the prisoner's sense of isolation and thereby create the "psychological atmosphere" foreseen by the Diplock Commission,¹⁴⁵ suspects are kept isolated for up to seven days.¹⁴⁶ They suffer severe stress and fatigue.¹⁴⁷ The future appears grim—they may believe they will be beaten or will receive long prison sentences—and they are kept awake long hours and probably find it difficult to sleep in a strange and frightening environment.¹⁴⁸ Each day related interrogation teams start the questioning anew, alternately menacing or befriending the disoriented suspect.¹⁴⁹ Evidence indicates that these techniques succeed relatively quickly, as "even the strongest will" weaken due to isolation, stress, fatigue, and uncertainty.¹⁵⁰

Psychological pressure theoretically may be sufficient to produce confessions, but in the atmosphere sanctioned by the Diplock Commission it was perhaps inevitable that the psychological approach would be mixed with or give way to violence. As has been seen, evidence from numerous and diverse sources suggests that violent interrogation has occurred frequently.¹⁵¹

142. *DIPLOCK REPORT*, *supra* note 62, para. 89, at 32.

143. *Id.* para. 84, at 30.

144. *Id.* para. 91, at 33. The Commission's attitude toward violence may be inferred from the following:

[w]e do not think that . . . the police . . . should be discouraged from creating by means which do not involve physical violence, the threat of it, or any other advantage or degrading treatment, a situation in which a guilty man is more likely than he otherwise would have been . . . to speak.

Id. (emphasis added).

145. See TEN YEARS ON, *supra* note 48, at 45.

146. *Id.* at 43-46.

147. *Id.* at 46.

148. *Id.*

149. *Id.*

150. *Id.* at 45.

151. See *supra* notes 116-22 and accompanying text.

2. "Torture, Inhuman or Degrading Treatment"—Flows in the Diplock Standard

The second major problem with the section 8 admissibility standard is that it is fundamentally ambiguous in two critical respects. First, an important inconsistency separates the Diplock Commission's intended interpretation of "torture, inhuman or degrading treatment" and the interpretation of that standard by the European Commission on Human Rights, to whose decisions, given the origins of the standard,¹⁵² the courts of Northern Ireland inevitably have looked for guidance. Second, it is unclear to what extent the section 8 standard preserves the common law tradition of judicial discretion in ruling on the admissibility of confessions. These two ambiguities have combined to produce enormous and dangerous confusion.

The European Commission offered a thorough interpretation of the "torture, inhuman or degrading treatment" standard in its opinion in the 1969 *Greek Case (Denmark v. Greece)*.¹⁵³ The case involved a complaint by four countries brought against Greece over its suspension of certain constitutional rights afforded its citizens, as well as its alleged torture of political prisoners. In sustaining some of the allegations of the complaint the Commission rendered the following definitions:

Inhuman treatment: at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.¹⁵⁴

Torture: often used to describe inhuman treatment, which has a purpose, such as the obtaining of information, or confession, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.¹⁵⁵

Non-physical torture: the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.¹⁵⁶

Degrading treatment: treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.¹⁵⁷

The Commission's majority opinion stated that "a distinction must be drawn between acts prohibited by Article 3 and 'a certain roughness of treatment [that] may take the form of slaps or blows of the hand on the

head or face."¹⁵⁸

An illustration of the Commission's view of this distinction may be found in the case of *X against the United Kingdom*,¹⁵⁹ a routine criminal case in which the applicant claimed to have been attacked by a police dog and assaulted twice while handcuffed.¹⁶⁰ While the Commission rejected the applicant's version of the facts, it concluded in dicta that even on its face the application did "not disclose a treatment so serious as to amount to inhuman or degrading treatment within the meaning of Art. 3 of the Convention."¹⁶¹ Thus, it is clear that the interpretation by the European Commission tolerates physical mistreatment not permissible under the voluntariness principle—a possibility that the Diplock Commission apparently did not foresee.¹⁶²

Two decisions on admissibility, handed down immediately before and after the enactment of the EPA, illustrate well the nature of the change that the implementation of the standard of the European Convention was intended to effect. Shortly before the EPA established the new admissibility standard, the Lord Chief Justice of Northern Ireland held in *Regina v. Flynn*¹⁶³ that confessions obtained at the Holywood Army Barracks were inadmissible because the Barracks was "a set-up officially organized and operated to gain information . . . from persons who would otherwise have been less willing to give it."¹⁶⁴ The Diplock Report specifically criticized this decision,¹⁶⁵ and the Lord Chief Justice accommodated that criticism in an opinion delivered shortly after the new standard took effect. In construing the new standard, he found in *Regina v. Cory*¹⁶⁶ that "[t]here is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials."¹⁶⁷

158. *Id.* at 501. Ironically, the Commission used these exact definitions in rendering its opinion in the 1971 case of *Ireland v. United Kingdom*, which involved a number of complaints of torture and inhuman or degrading treatment at the Holywood Army Barracks between August and December 1971. *Ireland v. United Kingdom*, 1978 E.C.H.R. 377, No. 5510/71 (European Commission of Human Rights, 1978), 1978-2 *Human Rights* 123 (1978), 1978-2 *Human Rights* 123 (1978). At the time of the complaint the Special Powers Act, the predecessor of the EPA, was still in effect. See *supra* note 29-32 and accompanying text.

159. 1971 V.B. Eur. Conv. on Human Rights 250 (Eur. Comm'n on Human Rights).

160. *Id.* at 252.

161. *Id.* at 276.

162. See *supra* note 144 and accompanying text.

163. *Regina v. Flynn*, 1971 V.B. Eur. Conv. on Human Rights 250 (Eur. Comm'n on Human Rights).

164. Note, *Admissibility of Confessions and the Common Law in Times of Emergency*, 24 N. I. L.Q. 199, 202 (1974) (quoting *Regina v. Flynn* (Bellan City Comm'n, May 23, 1972)).

165. *Diplock Report*, *supra* note 62, para. 83, at 30.

166. Note, 1979 N. I. 49 (Bellan City Comm'n, Dec. 4, 1973) (citing by *Lowry*, L.C.J.).

167. 1979 N. I. 50.

152. See *supra* note 119 and accompanying text.

153. 1969 (T.V. Greek Case) V.B. Eur. Conv. on Human Rights 1 (Eur. Comm'n on Human Rights). The case was a consolidation of applications by Denmark, Norway, Sweden, and the Netherlands.

154. *Id.* at 186.

155. *Id.*

156. *Id.* at 461.

157. *Id.* at 186.

Despite this apparent initial clarity, later cases have revealed that the courts of Northern Ireland are deeply troubled by the departure from the common law, and are finding the new standard difficult to interpret. One leading case on section 8 which betrays this difficulty is *Regina v McCormick*,¹⁶⁸ which concerned the admissibility of statements made by five defendants charged with offenses ranging from murder to membership in a proscribed organization.¹⁶⁹ After noting that the European Convention cases permit "a certain roughness of treatment,"¹⁷⁰ the Lord Justice (the trial court judge) wrote that decisions under article 3 appear to contemplate the use of physical violence not permitted under the common law standard.¹⁷¹ He further argued that if the Diplock standard were interpreted in the same way as article 3,¹⁷² it must be read to permit the use of "a moderate degree of physical maltreatment for the purpose of inducing a statement."¹⁷³ Put differently, the court appeared to hold that a statement would be held admissible unless "torture, inhuman or degrading treatment" in the sense described by the European Commission was used for the purpose of inducing it.¹⁷⁴

Shifting directions, however, the opinion then examined the power of judicial discretion, which, it maintained, provided non-statutory control over the means by which statements are obtained.¹⁷⁵ It invoked language from *Regina v. Corey*,¹⁷⁶ the earlier case interpreting the section 8 standard, to the effect that judges were still permitted to exclude statements if their admission "would not be in the interests of justice."¹⁷⁷ Seizing on this "interests of justice" rationale, the opinion excluded some of the statements at issue in *McCormick* because in its view they had been induced by physical violence.¹⁷⁸

168. 1977 N. Ir. 105.

169. *Id.* at 110.

170. *Id.* at 110.

171. On this issue, the court asserted that the terms torture or inhuman or degrading conduct in section 6 of the 1973 Act are taken from Article 3 and Parliament in using these words was incorporating the standards laid down in the European Convention on Human Rights and incorporating these in the domestic legislation.

172. *Id.* at 111.

173. *Id.*

174. *Id.*

175. See *supra* notes 166-67 and accompanying text.

176. 1977 N. Ir. at 112 (quoting *Regina v. Corey* (Bellair City Comm'n, Dec. 6, 1973)). Judicial discretion permits the court to exclude statements which satisfy the strict legal tests of voluntariness, but which the court concludes could not be admitted without "operating unfairly against the accused." *Chief Justice v. O'Halloran*, [1964] 1 O.B. 495, 501. Like the principle of voluntariness, which section 8 supersedes, this discretion is not expressly embodied in the common law. See GARDINER REPORT, *supra* note 63, para. 43, at 36.

177. 1977 N. Ir. at 112. In a later case, *Regina v. O'Halloran*, the Lord Chief Justice

In short, the opinion is contradictory. After apparently endorsing the view that "it is open to an interviewer to use a moderate degree of physical maltreatment for the purpose of inducing a statement,"¹⁷⁸ the opinion excluded statements precisely on the ground that violence had been used to obtain them. The rationale of the opinion was further obscured by language in the conclusion to the effect that the discretionary power "should not be exercised so as to defeat the will of Parliament as expressed" in section 8.¹⁷⁹

The second basic ambiguity in the interpretation of section 8 is, however, precisely that the will of Parliament with respect to the judicial power of discretion is impossible to determine. The Diplock Commission clearly intended that its proposed standard would suspend the common law principle of voluntariness, and would remove from judges the discretionary power to depart from the standard even should the "interests of justice" require it.¹⁸⁰ It seemed neither to anticipate the use of physical violence in interrogation, nor to be aware that the case law under article 3 permitted such conduct.¹⁸¹

The Gardiner Committee, the only Parliamentary body to review the EPA, conceded that reading the Diplock Report might lead one to believe that by enacting the EPA, Parliament had intended that judges no longer have discretion over admissibility in trials of scheduled offenses.¹⁸² It rejected this view, however, and argued that Parliamentary withdrawal of such well-established judicial power could only be made in "clear terms,"¹⁸³ which the EPA failed to do. The Gardiner Report favored an express statutory affirmation that judicial discretion was unimpaired, and recommended a provision to that effect to Parliament.¹⁸⁴ Such language has not been inserted, however.

In short, the language which the Gardiner Committee maintained was necessary to remove the power of discretion has not been inserted in the EPA. Nor has the language it suggested that would affirm ex-

appeared to deny the permissibility of any degree of physical violence. 1979 N. Ir. 45 (C.A.). In fact, he expressed doubts that even under the section 8 standard a court should ever admit statements obtained since had been shown to have occurred during the interrogation.

178. 1977 N. Ir. at 111.

179. *Id.* at 114.

180. The Diplock Report asserted that "the current judicial rules, practice and judicial discretion . . . are in accordance with the principle of voluntariness which is the basis of the common law. . . . The possibility of confessions ought to be safeguarded for the duration of the emergency in respect of Scheduled Offenses." DIPLOCK REPORT, *supra* note 62, para. 49, at 32.

181. See *supra* notes 153-61 and accompanying text.

182. GARDINER REPORT, *supra* note 63, para. 48, at 16-17.

183. *Id.* at 17.

184. *Id.* para. 50, at 17.

plity the power of discretion. While Parliament has not resolved the matter, some courts in Northern Ireland have concluded that their discretionary power still survives.¹⁸⁵

It seems fair to draw at least two conclusions from this confusion. First, the section 8 standard is inherently ambiguous in two fundamental respects. First, the approach of the Diplock Commission and that of the European Commission differ with respect to the permissibility of the use of physical violence. This tension has not been resolved, and the courts of Northern Ireland have been left with the difficult task of reconciling the Diplock approach, which did not contemplate the use of physical violence,¹⁸⁶ and the European Commission approach, which has found "blows or blows of the hand on the head or face not unacceptable."¹⁸⁷ In addition, it is not clear whether in trying to reconcile these two approaches, the courts of Northern Ireland may invoke their common law discretionary powers, although some have continued to do so.¹⁸⁸

The second conclusion to be drawn is that it seems likely that the confusion over the "torture, inhuman or degrading treatment" standard has contributed to the use of violence during interrogations. One study of post-McCormick cases has concluded that "the possible exclusion of statements did not act as an effective control of police malpractice."¹⁸⁹ The authors of the study asserted that the inherent ambiguity of section 8 as revealed in judicial application may have persuaded some interrogators that physical ill treatment was permissible.¹⁹⁰ Although section 8 and the admissibility of confessions were, strictly speaking, outside its mandate,¹⁹¹ the Bennett Committee noted that "the uncertainty, despite the standards upheld and applied by the courts, about what is permissible and what is not, short of the use of physical violence or ill treatment, may tempt police officers to see how far they can go and what they can get away with."¹⁹² It is clearly questionable whether the Commission's confidence that the application of

185. An evidence manual written by an R. U. C. investigator has concluded that the judicial power of discretion survived the enactment of the EPA. See K. MASTERS, *supra* note 137, at 25-26. Grier has concluded, rather safely, that "a precise analysis of the scope of the judicial discretion in the context of section 8 is not yet feasible." Grier, *supra* note 109, at 224.

186. See *supra* notes 143-44 and accompanying text.

187. See *supra* notes 153-58 and accompanying text.

188. See *supra* notes 176-77 and accompanying text.

189. TEN YEARS ON, *supra* note 48, at 48.

190. *Id.*

191. BENNETT REPORT, *supra* note 87, para. 3, at 2.

192. *Id.* para. 94, at 33.

Northern Ireland

the standard would prevent the use of physical violence was justified. It is unquestionable that its general apprehension of the problems likely to be caused by the standard was justified.

C. Defense of the New Standard: A Rebuttal

A defense of the new standard of admissibility would probably focus on its ostensible efficacy. Concern that the standard may encourage psychological or even physical violence is misplaced, it could be argued, because such violence can be justified in the name of community safety. Confessions are crucial, given the present situation, because witnesses are reluctant to testify out of fear of the terrorists or out of general disrespect for the system of justice. Confessions are difficult to obtain with traditional means of interrogation, however, because dedicated terrorists are not likely to "crack" as would ordinary criminals. In short, such a defense would squarely pose an alternative: a choice must be made between violence in interrogation and violence in the streets, and the former is to be preferred.

This defense is vulnerable to several attacks. In the first place, it can be argued that questions of efficacy are simply irrelevant. The techniques contemplated under section 8 are *a priori* unacceptable. The psychological damage inflicted by the non-physical abuse may be just as significant as that inflicted by more physical forms of persuasion. The physical violence that is the inevitable product of the new standard would never be tolerated as punishment for persons already proven guilty. Accordingly, it cannot be accepted as an appropriate instrument for use in the determination of guilt.

Even should the efficacy argument be accepted in principle, it can be defeated on its own terms. The new admissibility standard has not, as far as can be ascertained, contributed to a decline in the level of violence. While the overall level of violence fell sharply in the last four months of 1976,¹⁹³ this decline was in all likelihood due to the emergence of the Peace People, a non-sectarian peace group which inspired broad-based marches calling for an end to the conflict.¹⁹⁴ There was,

193. The indices for the measurement of terrorist activity showed declines of 30% to 60% during the last four months of 1976, as compared with the same period for 1975. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT FOR 1977, at 72, 73 (tables 1-5) (1978). Nonetheless, terrorist activity, as measured by the number of politically related murders, ran at high levels in 1976, the first full year of the new emphasis on conviction in courts of law. The data show the year to have been the third worst since the outbreak of the violence in 1969. See ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT 1976, at 13 (table 3) (1976).

194. See N.Y. TIMES, Sept. 5, 1976, at 15, and 1, *id.*, Oct. 24, 1976, at 18, col. 1, *id.*, Nov. 28, at 17, col. 1.

however, no evidence that the interrogation practices tolerated under section 8 were effective in decreasing the number of terrorist crimes,¹⁹⁵ whatever their success in producing individual confessions.¹⁹⁶ In fact, terrorist acts measured in number of deaths by violence and number of terrorist incidents actually increased in 1976, the full first year in which the new approach was employed. It is plausible that the interrogation controversy increased opposition to government policies and added new recruits to terrorist rolls, at least on the Republican side.

A second flaw in the efficacy argument is that it fails to take account of data indicating that only a relatively small number of those interrogated under the new standard have been charged with a crime. For the period between September, 1977 and August, 1978, only 37% of those interrogated at Castlebar and 24% of those interrogated at Gough and Strand Road, Londonderry were ultimately charged.¹⁹⁷ During the first ten months of 1980, only 8.6% of all those arrested under the EPA were ever charged.¹⁹⁸ These figures admit of only two conclusions: either large numbers of innocent people have been subjected to prolonged interrogation, or prolonged interrogation failed in most cases to produce a confession from those who had something to confess.

Equally damaging to the efficacy defense of section 8 is the finding by Boyle, Hadden and Hillyard that "the majority of those who did make a confession did so relatively quickly."¹⁹⁹ Fifty percent of all those covered in their survey who chose to make a statement did so within the first three hours of interrogation, and a further 25% within the next three hours.²⁰⁰ Prolonged interrogation, stress, fatigue, and mental and physical harassment do not appear to have been important factors in inducing most confessions. Perhaps the extended interrogations could be justified if it could be shown that the last 25% of the confessions, those which were not forthcoming until after the initial six hours of interrogation, came from hardened men and women of violence. The very fact that the government has never produced any data which support this conclusion is suggestive, if evidence showing that

195. Despite the substantial decline at the end of the year, 287 politically related fatalities occurred in 1976, compared with 247 in 1975. ROYAL ULSTER CONSTABULARY, *ANNUAL REPORT 1976*, at 19 (1976). Similarly, 3,339 terrorist incidents were reported in 1976, as compared with 3,324 in 1975. *THE IRISH TIMES*, at 1 (1976). Charges were brought against 708 terrorist suspects in 1976, more than double the number for 1975. P. TAYLOR, *REPORT*, *supra* note 116, at 30.

196. *IRISH TIMES*, *supra* note 116, at 30.

197. BERNETT REPORT, *supra* note 87, app. 1, at 141.

198. See *supra* note 89 and accompanying text.

199. Boyle, Hadden and Hillyard, *supra* note 41, at 44-45.

200. *Id.* at 45.

Northern Ireland

those who confessed after prolonged interrogation tended to be those most responsible for the violence, one must assume that it would have been given wide publicity during the long period of criticism of the security forces for their interrogation practices.²⁰¹

Whatever success section 8 may be claimed to have had in inducing true confessions must be balanced against the significant danger that it may also induce false confessions. The underlying rationale of the voluntariness principle was to guard against this danger, as well as to discourage improper police practices.²⁰² Although no clear proof of a false confession has been found, substantial doubts about the validity of confessions have been raised in a significant number of cases.²⁰³ One RUC detective, a member of an interrogation team, has estimated that 2% of all those convicted were innocent.²⁰⁴ That would suggest that between 1976 and 1977 over 50 innocent people were convicted.²⁰⁵

The last and most damaging argument to be made against those who would justify section 8 on grounds of efficacy is that it contributes to the perceived substantive unfairness in the legal system.²⁰⁶ Police interrogation practices as condoned by section 8 are certain to arouse popular anger, and further diminish prospects for popular cooperation with security forces. The Diplock Commission warned that "the reputation of Courts of Justice would be sullied if they countenanced convictions on evidence obtained by methods which flout universally accepted standards of behavior."²⁰⁷ Ironically, however, section 8 is contributing to precisely that result.

IV. Police Complaint Procedures

So long as extraordinary powers are conferred on the security forces by statutes such as the EPA, it is essential that the exercise of these powers be tempered by the establishment in Northern Ireland of procedures for the independent investigation and evaluation of allegations of police misconduct. The need for such procedures is made even more pressing by the longstanding tradition of discrimination against the Catholic minority in the administration of justice.²⁰⁸ Therefore, it must

201. See *supra* note 116-24 and accompanying text.

202. R. CHOD, *EVIDENCE* 446-47 (2d ed. 1963).

203. *THE IRISH TIMES*, *supra* note 116, at 41.

204. P. TAYLOR, *REPORT*, *supra* note 41, at 339.

205. See *supra* note 27-28 and accompanying text.

206. DIMPLOCK REPORT, *supra* note 62, para. 89, at 32.

207. See *supra* note 27-33 and accompanying text.

be regarded as a critical failing of the legal system in Northern Ireland that such procedures are virtually nonexistent.

The call for the establishment of procedures for the independent investigation of complaints was sounded almost as soon as the current cycle of violence began in Northern Ireland in 1969. The Cameron Report, which studied the rioting of that year, recommended the abandonment of the longstanding policy that only the Chief Constable institute disciplinary courts of inquiry,²⁰⁹ and that independent procedures be established.²¹⁰ These recommendations were not adopted, however, and despite further calls for the institution of such procedures,²¹¹ and the implementation of some superficial reforms,²¹² the need remains as pressing as ever.²¹³

In 1970, the parliament of Northern Ireland significantly overhauled the administration of the R.U.C. by the passage of the Police Act (Northern Ireland),²¹⁴ which removed the constabulary from the direct control of the Minister of the Interior of Northern Ireland.²¹⁵ The act made the constabulary responsible to the Police Authority,²¹⁶ a public body appointed by the Governor of Northern Ireland,²¹⁷ and to be composed of diverse community representatives.²¹⁸ Part of the Police Authority's mandate was, and remains, to keep itself "informed as to the manner in which complaints from the public against members of the police force are dealt with by the Chief Constable."²¹⁹ As part of its

209. See Constabulary (Ireland) Act, 6 & 7 Will. 4, ch. 12, § 24.

210. CAMERON REPORT, *supra* note 38, at para. 230.

211. See GARDINER REPORT, *supra* note 63, para. 97, at 32.

212. See *infra* notes 222-28 and accompanying text.

213. This issue also has received substantial attention throughout the United Kingdom as a whole. See REPORT OF A WORKING PARTY APPOINTED BY THE HOME SECRETARY ON THE REQUIREMENT OF AN INDEPENDENT ELEMENT IN THE INVESTIGATION OF COMPLAINTS AGAINST THE POLICE (1971) (LORD PLOWDEN, Chairman) (reporting the establishment of independent investigations in the United Kingdom by officers from other forces); REPORT OF AN INQUIRY INTO THE BARRON DEMONSTRATION (1972) (LORD SCARMAN, Chairman) (concluding after analysis of the causes of the Brixton race riots that independent evaluation of complaints is appropriate).

214. 1970 N. Ir. Pub. Gen. Acts, ch. 9.

215. *Id.* § 1.

216. *Id.* § 1.

217. *Id.* § 1(3), which, 1, § 1(9). After the imposition of direct rule from Westminster, control over the Police Authority was vested in the Secretary of State for Northern Ireland.

218. *Id.* This reform was instituted at the recommendation of the Hunt Commission, which had been appointed in the wake of the 1969 rioting to analyze the structure of the police force. See REPORT OF THE ADVISORY COMMITTEE ON POLICE IN NORTHERN IRELAND, N. Ir. Cmd. No. 535, at 3 (1969) (J. Hunt, Chairman) (hereinafter HUNT REPORT). The Commission found that the police were too directly responsible to elected officials in a political system in which victory virtually was guaranteed to the members of a single party. *Id.* paras. 64-65, at 21-22.

219. 1970 N. Ir. Pub. Gen. Acts, ch. 9 § 12(1). The wording of the statute speaks of the

Northern Ireland

general power to keep itself informed, the Authority can request reports on complaints and investigations,²²⁰ and in cases that affect "the public interest," can require the Chief Constable to convene a tribunal of inquiry.²²¹

The issue of police complaint procedures has received extensive attention in Northern Ireland since the publication of the Cameron Report. In addition to proposing the establishment of the Police Authority, the Hunt Commission recommended that complaints be investigated by police officers from counties different from those of the officers being investigated,²²² and the Black Report, which reviewed the problem once more in 1974, found that this reform had been implemented.²²³ In the meantime, the Gardiner Report had called for the establishment of independent procedures,²²⁴ but this proposal was rejected by the Black Report, which instead endorsed the establishment of a Police Complaint Board.²²⁵ Finally, the Bennett Report of 1979 recommended further limited reforms, including a policy that in cases that have aroused "public disquiet," every effort be made to use investigating officers from other police forces in the United Kingdom.²²⁶

Despite all this attention to the problem, the basic structure remains the same. As the Black Report endorsed as a fundamental principle,²²⁷ and as the Bennett Report accepted for what it claimed was the lack of a better alternative,²²⁸ operational control over the investigation of complaints remains in the hands of the police. While four separate procedures for the investigation of complaints have been established, none can be called independent in any meaningful sense. Thus, the complaint procedures remain inadequate, and the public perception of the legal system suffers as a result.

A. Criminal Prosecution by the Director of Public Prosecutions

Under regulations issued pursuant to the 1970 Police Authority Act, the Chief Constable is the disciplinary authority for all ranks up to and

"Inspector General," but regulations issued since its enactment have replaced that phrase with the phrase "Chief Constable." BENNETT REPORT, *supra* note 87, para. 284, at 96.

220. 1970 N. Ir. Pub. Gen. Acts, ch. 9, § 15(2).

221. *Id.* § 13.

222. REPORT, *supra* note 218, para. 133, at 32.

223. REPORT OF THE WORKING PARTY FOR NORTHERN IRELAND, CMD. 5, No. 6475 (1975) (Sir Harold Black, Chairman) (hereinafter BLACK REPORT).

224. GARDINER REPORT, *supra* note 63, para. 98, at 32.

225. BLACK REPORT, *supra* note 223, para. 53, at 16. This reform was instituted in 1977.

See *infra* notes 229-31 and accompanying text.

226. BENNETT REPORT, *supra* note 87, para. 297, at 118.

227. BLACK REPORT, *supra* note 223, para. 22(6), at 8.

228. *Id.* para. 336, at 117-18.

including Chief Superintendent, while the Police Authority is given responsibility for the higher ranks.²²⁸ The authority for the lower ranks has been delegated to a Senior Deputy Chief Constable, who evaluates the complaint in the first instance and then assigns a member of the Complaints and Discipline branch of the R.U.C. to investigate it.²²⁹ After the investigator's report has been reviewed, the Chief Constable must send it to the Director of Public Prosecutions (D.P.P.) unless he is "satisfied that no criminal offence has been committed."²³⁰

Under Article 5 of the Prosecution of Offences Order,²³¹ the decision to press any criminal charge, including the indictment of a police officer, is entirely the responsibility of the D.P.P., whose discretion in this regard is subject only to his accountability to the Attorney General of the United Kingdom.²³² The inherent weakness of this putative independence is apparent, however, in that the Order establishes no power of investigation, and, in fact, the D.P.P. has no staff for investigation.²³⁴ Any further information required by the D.P.P. must be requested from the Chief Constable.²³⁵ Thus, the prosecution decision is only nominally an independent one; the D.P.P.'s dependence on the R.U.C. for the investigation of any complaint against members of the R.U.C. is absolute.

B. R.U.C. Disciplinary Procedures

The role of the D.P.P. in the evaluation of complaints against the police is to determine whether the senior police officer's report contains sufficient evidence upon which to initiate criminal proceedings against the accused policeman.²³⁶ A variety of factors, including the credibility of potential witnesses, the admissibility of evidence, and the presence of competing demands on limited staff may influence the D.P.P.'s decision.²³⁷ None of these factors may necessarily address the issue of whether an assault or some other behavior warranting disciplinary ac-

228. R.U.C. (Complaints) Regulations, 1977 STAT. R. & O.N. in No. 235 R.U.C. (Discipline and Disciplinary Appeals) Regulations, 1977 STAT. R. & O.N. in No. 236.
229. BENNETT REPORT, *supra* note 87, para. 285, at 97.
230. 1970 N. Ir. Pub. Ord. Act, ch. 9, § 13(5). Pursuant to powers conferred by the Prosecution of Offences Order, the D.P.P. has required the Chief Constable to send it any allegation of criminal conduct against a police officer. Prosecution of Offences (Northern Ireland) Order, 1972 STAT. INTR., No. 538, art. 43(b); *see* BENNETT REPORT, *supra* note 87, para. 286, at 97.

231. Prosecution of Offences (Northern Ireland) Order, *supra* note 231, art. 5.

232. BENNETT REPORT, *supra* note 87, para. 288, at 98.

233. *Id.*

234. BENNETT REPORT, *supra* note 116, at 57.

235. *Id.*

236. *Id.*

237. *Id.*

Northern Ireland

tion has occurred. Nonetheless, the R.U.C. has consistently interpreted British double jeopardy rules to require that if the D.P.P. has considered and rejected criminal charges against a constable or police officer, internal disciplinary action is automatically precluded. The result of this interpretation has been substantially to undercut whatever role the R.U.C. internal disciplinary procedure might play in the investigation of complaints against the police.

The literal wording of the double jeopardy rule would not appear to require that a decision not to prosecute rule out internal disciplinary proceedings. According to the Police Order of 1977, "where a member of the police force has been acquitted or convicted of a criminal offence he shall not be liable to be charged with any offence against discipline which is in substance the same as the offence of which he has been acquitted or convicted."²³⁸ As the Bennett Report pointed out, however, "[a]cquitted means, of course, acquitted by a court, but, in the application of the 'double jeopardy' rule, 'acquitted' has also been taken to refer in some degree to decisions by the Director of Public Prosecutions that there should be no prosecution."²³⁹ It also noted that the R.U.C. approach to the double jeopardy rule has been more absolute than was intended.²⁴⁰ Nonetheless, the R.U.C. disciplinary machinery, which could play an important role in controlling misconduct that falls below the level of an indictable offense but that is still counterproductive or unbecoming, will not investigate a case in which the D.P.P. has declined to prosecute.

C. Tribunals of Inquiry

A third procedure for the evaluation of complaints against the police is that the Police Authority can require the establishment of a tribunal of inquiry.²⁴¹ In cases in which the complaint "relates to a matter affecting or appearing to affect the public interest,"²⁴² the Police Authority can require the Chief Constable to "refer the complaint to a tribunal consisting of a lawyer appointed by the Lord Chief Justice of Northern Ireland and two police officers appointed by the Authority itself."²⁴³

238. Police (Northern Ireland) Order, 1977 STAT. INTR., No. 53, art. 14.

239. BENNETT REPORT, *supra* note 87, para. 360, at 120.
240. *Id.* at 121. This policy, the Bennett Report argues, was the cause in 1977 of a House of Commons Select Committee report against the arbitrary broad application of the double jeopardy rule in the context of police disciplinary procedures. *Id.*

241. Police (Northern Ireland) Act, 1970, ch. 9, § 13(2).

242. *Id.*

243. *Id.* § 13(3). These officers may be affiliated with any police force in the United Kingdom. *Id.*

Although the tribunal option would appear to offer some promise of independent investigation, as of 1979 it had been invoked only once since the Police Authority was established in 1970.²⁴⁴ The number of complaints has remained relatively constant; in 1972, 2,617 complaints were filed, and in 1979, 2,183 were filed.²⁴⁵ To discharge its statutory mandate to keep itself informed of complaints against the police, the Police Authority during this period relied exclusively on the reports it received from the R.U.C. It had considered the tribunal option only twice before the first and only establishment of a tribunal of inquiry, which was appointed in 1979 to consider the case of James Rafferty.²⁴⁶

The facts and aftermath of the Rafferty case suggest that any hope that the tribunal of inquiry might be able to exercise independent investigatory power is misplaced. After his arrest on November 11, 1976, Rafferty, who had no prior criminal record, was interrogated for three days.²⁴⁷ Upon his release he was examined by two doctors, one a police surgeon, who found him to be suffering severe bruises and a spinal laceration, and who recommended urgent hospital treatment.²⁴⁸ Rafferty was hospitalized for four days after his release, during which time the extent of his injuries was confirmed by two more doctors, one a Fellow of the Royal College of Surgeons.²⁴⁹ No criminal charge was ever brought against him.

Although the matter was raised by one of its own members almost immediately after the incident, for two years the Police Authority refused repeated requests to initiate a tribunal of inquiry.²⁵⁰ During that period the investigations undertaken by the R.U.C. and by the D.P.P. both came to naught.²⁵¹ Finally, in October, 1978, the Police Authority agreed that a tribunal should hear the case, and in the spring of 1979, the tribunal was appointed.²⁵² The tribunal began to hear testimony in December, 1980.²⁵³ After medical testimony corroborated the severity of his injuries, Rafferty himself testified. Certain cross examination

244. BENNETT REPORT, *supra* note 84, para. 392, at 130. During the same period, almost 20,000 formal complaints were filed against the police, including 1,382 alleging an assault during interrogation, during the period from 1976 to 1978. *Id.* app. II, at 162 (data supplied by the R.U.C.).
245. *THE IRISH TIMES*, (London), 1980, at 10.
246. *THE IRISH TIMES*, (London), 1979, at 10.
247. P. TAYLOR, *supra* note 116, at 105.
248. *Id.* at 84.
249. *Id.* at 96.
250. *Id.* at 97.
251. *Id.* at 97-105.
252. *Id.* at 105.
253. *Id.* at 105.

254. *Id.* at 97.
255. *Id.* at 97.
256. *Id.* at 97.
257. *Id.* at 97.
258. *Id.* at 235. Lord Justice Gifford called the result "unusually unfortunate," but held that the law left him no room for a different decision. *Id.* at 240.
259. Police (Northern Ireland) Order, *supra* note 238, art. 3(1).
260. *Id.* art. 3(2).
261. BLACK REPORT, *supra* note 223, para. 53, at 15-16.
262. *Id.* para. 16, at 6-7, *see supra* note 229-31 and accompanying text.
263. BLACK REPORT, *supra* note 223, para. 22(1), at 8.
264. *Id.* para. 22(6), at 8.
265. Police (Northern Ireland) Order, *supra* note 238, art. 5.

Rafferty by counsel for the police witnesses was ruled improper, whereupon counsel and the police witnesses refused to participate further in the proceedings.²⁵⁴ Following this action, the tribunal sought and obtained subpoenas that required the police witnesses to testify.²⁵⁵ Six of the witnesses appealed this decision, and nine days later Lord Justice Gifford quashed the subpoenas,²⁵⁶ ruling that the tribunal was not exercising a judicial function and therefore could not avail itself of the subpoena power of the courts.²⁵⁷ This decision effectively ended the inquiry, for the police witnesses indicated that, at the advice of counsel, they would not participate further in the inquiry unless legally compelled to do so.²⁵⁸ Thus, the Police Authority's first and heretofore only tribunal of inquiry, held four years after the occurrence of the incident it was to investigate, broke up after two days of testimony. Any confidence that the community might have had in its institutional capacity to conduct independent investigations was perhaps permanently destroyed.

D. The Police Complaints Board

The fourth procedure for the evaluation of complaints lies with the Police Complaints Board, which consists of at least six members,²⁵⁹ none of whom may be affiliated with a police force.²⁶⁰ According to the Black Report, which endorsed the establishment of the Board,²⁶¹ the rationale underlying its creation was to introduce "some form of independent scrutiny" into the investigation of complaints made against the R.U.C. but which are not referred to the D.P.P.²⁶² The Board was intended neither to make its own investigations,²⁶³ nor to usurp the position of the D.P.P.,²⁶⁴ rather, by receiving copies of complaints and investigation reports,²⁶⁵ it was to consult with and make recommendations to the Chief Constable about possible internal disci-

254. *Id.*
255. *See In re Serritt*, 1980 N. Ir. 234, 234.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

plinary procedures.²⁶⁶ The Board is not sent copies of complaints that the Chief Constable forwards to the D.P.P. until after the question of criminal proceedings has been settled.²⁶⁷

The fundamental problem with this structure is that because virtually all complaints made against the police allege some criminal conduct,²⁶⁸ they are therefore sent first to the D.P.P.²⁶⁹ Thus, the Board is not involved in the evaluation of any complaint that alleges criminal conduct; either the D.P.P. presses criminal charges, which eliminates any role for the Board, or the D.P.P. does not, which, given the peculiar interpretation of the double jeopardy rule in Northern Ireland, has the same effect.²⁷⁰

In short, the Police Complaint Board's power is confined to whatever role it might play with the Chief Constable concerning the appropriateness of internal disciplinary proceedings in those rare cases in which criminal behavior is not alleged in the complaint at issue. Even this limited power has not been used effectively,²⁷¹ and if it were, it is the possible criminal behavior of members of the R.U.C., not minor disciplinary infractions, with which the public is most concerned. Thus, it is most unlikely that the Board will ever play an important role in the investigation of complaints against the police.

E. *The Need for Independent Investigations*

No procedure for the independent investigation of complaints against the police yet exists in Northern Ireland. Criminal prosecution by the D.P.P., the tribunals of inquiry, and the Police Complaint Board are all thoroughly dependent on the cooperation of the R.U.C. The constabulary's internal disciplinary powers, even should they be exercised in good faith, are seriously handicapped by the interpretation of the double jeopardy rule. Until this failing is remedied, public confidence

266. *Id.* art. 6. As a power of last resort the Board can compel the Chief Constable to initiate a disciplinary hearing. *Id.* art. 6(2).

267. *Id.* art. 8(1).

268. See BENNETT REPORT, *supra* note 87, para. 329, at 110.

269. *Id.*; see *supra* notes 225-31 and accompanying text.

270. See *supra* notes 234-40 and accompanying text. In a special report to the Secretary of State, the Board itself expressed the view that the extent of the restriction on its scope of review by the double jeopardy rule was not fully appreciated by its members at the time of their appointment and that the rule "constituted a serious curtailment" of the effectiveness of their role. BENNETT REPORT, *supra* note 87, para. 332, at 112.

271. The Bennett Report noted that as of March 1979, the Board had not exercised any of its powers. *Id.* para. 334, at 112. In June, 1981, an independent inquiry panel found that the Police Complaint Board and the tribunals of inquiry, whose weakness had been betrayed in the Rafferty case, were "seriously ineffective." THE ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND, *supra* note 133, at 4.

Northern Ireland

dence in the legal system, so important to the achievement of a peaceful solution to the conflict, will remain seriously diminished.

Two factors guarantee that even if the R.U.C. changed its interpretation of the double jeopardy rule to permit departmental investigations despite a decision not to prosecute, independent investigations would still be required. The first, not unique to Northern Ireland, is the inherent difficulty in asking members of the police force to investigate their colleagues. Members of the R.U.C., like policemen everywhere, share a spirit of loyalty and are anxious not to harm a fellow officer performing a difficult job. This spirit of corporate unity, no doubt made even more intense by the deaths of 173 members of the police at the hands of terrorists between 1969 and 1982,²⁷² inevitably penetrates and weakens the independence and objectivity of police investigations.

The second factor arguing in favor of the need to establish independent complaint procedures is a legal one which concerns the possibility of conflict of interest. In cases in which the complaint stems from police conduct during an interrogation, the complainant may have been charged with a criminal offense on the basis of his or her admission. A vigorous investigation of the complaint may have the effect of rendering inadmissible the confession made by the criminal defendant *qua* complainant. In light of this circumstance, the Bennett Commission found that the "investigation of a complaint will consciously or unconsciously be influenced by the wish to support the Crown case against the complainant."²⁷³ A vigorous investigation of a complaint may be viewed not only as a slap against fellow officers, but also as an actual reward for criminal defendants. Thus, a conflict of interest inevitably is presented to the prosecutor who directs the investigation of the complaint and to the police who perform the actual investigation itself.

So long as no independent investigation of complaints against the police exists in Northern Ireland, the perception of discrimination in the administration of justice, already so deeply rooted in the Catholic community,²⁷⁴ is bound to continue. Thus, one important goal of the last decade of British policy in Northern Ireland—public acceptance of the R.U.C. as "civilian, impartial, and accountable"²⁷⁵—is bound to fail. The data show that only fourteen prosecutions were pressed against police officers in the years 1976 through 1979, and not a single

272. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT 1982, at 48 (table 6) (1983).

273. BENNETT REPORT, *supra* note 87, para. 332, at 117.

274. See BENNETT REPORT, *supra* note 87, para. 329, at 110, and accompanying text.

275. HORT REPORT, *supra* note 218, para. 176, *see* AMNESTY INTERNATIONAL, *supra* note 111, at 1-2.

conviction was obtained.²⁷⁶ Despite the wave of negative publicity that preceded the appointment of the Bennett Committee, at the time its report was issued not a single police officer had been convicted of a crime arising out of a maltreatment claim.²⁷⁷ The Standing Advisory Committee on Human Rights has repeatedly urged that "justice must not only be done, it must be seen to be done."²⁷⁸ Given the present state of the procedures for the investigation of complaints against the police, it is hardly surprising that many people neither see justice being done, nor believe that it is being done at all.

V. Ameliorating the Situation: An Agenda for Reform

Incremental reforms can be implemented that would help convince the public that a system offering substantive and procedural fairness can be built in Northern Ireland. Indeed, the very implementation of reforms in the admissibility standard and in the procedures for the investigation of complaints made against the police would send a clear signal that the authorities themselves are determined to govern within reasonable limits prescribed by law, and without resort to "emergency" powers that invite arbitrary and capricious misuse. No reform can be expected to eradicate overnight centuries of hatred and mistrust. Sensible and feasible measures are available, however, that could begin the process of building confidence in the rule of law that is the surest weapon against those who would resort to violent and extra-legal means to achieve their objectives.

A. *Interrogation Practices and the Admissibility Standard of Section 8*

The fact that the admissibility standard of section 8 of the EPA is derived from the European Convention on Human Rights does not justify ignoring the manifold problems it has created. Decisions under the Convention appear to condone the use of physical violence in interrogations by the police, and the standard's imprecision has made impossible the coherent judicial interpretation of its requirements. Reforms must be implemented to resolve both these difficulties.

276. P. TAYLOR, *supra* note 116, at 58.

277. BENNETT REPORT, *supra* note 87, para. 157, at 52. During this period 19 officers were prosecuted. Of these, 16 were convicted and 3 were acquitted. The 16 convicted officers were not all sentenced to prison. The 3 convicted officers were sentenced to prison after trial had begun, and 2 convictions were based on confessions obtained after trial had begun. See STANDING ADVISORY COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT (1980) (on file with The Yale Journal of World Public Order). The committee was created by the Northern Ireland Constitution Act, 1973, ch. 36, § 20.

Northern Ireland

1. *Physical Violence in Interrogation Is Counterproductive and Should Be Specifically Proscribed*

The use of physical violence in interrogation is counterproductive in at least two ways. (1) as the Diplock Commission recognized, it may prevent the development of any rapport between the person questioned and the questioners; and (2) it only exacerbates the atmosphere of community distrust that permeates Northern Ireland. An explicit and absolute ban on its use might make possible more effective interrogation and certainly would improve community relations.

To make such a ban meaningful, the message must be clearly conveyed to all concerned that not only will evidence that has been obtained by the use or threat of violence be excluded from the courts, but that members of the police force who violate the proscription will be punished. The promulgation of a code of permissible interrogation practices would constitute a useful first step in the communication of such a message.²⁷⁹ In addition, the establishment of independent procedures for the evaluation of complaints made against the police would deter further abuse and assure the public that the problem is taken seriously by the authorities.

2. *The Admissibility Standard of Section 8 Should Be Abolished and the Common Law Test of Voluntariness Restored*

The practical operation of section 8 has created serious problems that have not been offset by any compensating increase in public safety. This fact should be recognized, and the standard abolished. The voluntariness test should be restored, together with a re-affirmation of the power of judicial discretion to exclude admissions of dubious probative value or ones made under questionable circumstances. Other provisions of the EPA have provided the security forces sufficient powers of investigation and detention such that this counterproductive and unfair standard can be safely abandoned.

B. *The Investigation of Complaints Against the Police*

The clear lack of any power of independent investigation in the hands of the D.P.P., the Police Authority, or the Police Complaints Board and the regular acquittals in the few prosecutions of members of the police preclude the development within the Catholic community of any feeling of confidence in the fairness or impartiality of the R.U.C.

279. See BENNETT REPORT, *supra* note 87, para. 140-43, at 43-44. Professor Boyle, Madden, and Huxford have drafted such a code which would serve as a model for the regulation of interrogation practices. TEN YEARS ON, *supra* note 48, at 110-13.

That confidence is especially important in a society in which the police are, and have been for decades, vested with special emergency powers of unreviewable discretion that permit the detention of suspects for days without charge. A thoroughgoing reform of the procedures for the investigation of complaints against the police is essential in a community in which distrust between members of a minority community on the one hand, and members of the security forces and the majority community on the other, is rampant.

1. *The Rule Against Double Jeopardy Must Be Construed Literally*

A decision by the D.P.P. not to prosecute should not result in the absolution of those accused of disciplinary offenses that do not rise to the level of criminal behavior. The use of internal disciplinary machinery should not be confused with the public prosecution of a criminal offense. Misconduct which is less than criminal still may merit disciplinary sanction, and the R.U.C.'s interpretation of the double jeopardy rule should be changed to take cognizance of this fact.

2. *Complaints Must Be Investigated by Persons Institutionally Independent from Those Persons Being Investigated*

Systems for the investigation of complaints made against the police generally involve four steps—the receipt of the complaint, the investigation of the complaint, the determination whether to initiate proceedings, be they disciplinary or judicial, and the ultimate resolution of the complaint. Independence can be established at any or all of these steps.²⁸⁰ It can be ensured by establishing a special police unit to investigate complaints, or by creating an oversight position in the form of an ombudsman.

A special police unit established solely to investigate complaints against the police should be designed to take account of the need to protect police morale as well as the need for the thorough and independent investigation of complaints. As a full-time body, the unit would be able to develop expertise in the investigation of complaints.

280 The author has surveyed elsewhere possible methods for the creation of such independence. See T. Foley, *COURTS AGAINST THE POLICE* (1980). See also *Report of the Commission of Enquiry into the Administration of the Garda Síochána* (1978), paras. 10-12, 14-15, 17-18, 20-21, 23-24, 26-27, 29-30, 32-33, 35-36, 38-39, 41-42, 44-45, 47-48, 50-51, 53-54, 56-57, 59-60, 62-63, 65-66, 68-69, 71-72, 74-75, 77-78, 80-81, 83-84, 86-87, 89-90, 92-93, 95-96, 98-99, 101-102, 104-105, 107-108, 110-111, 113-114, 116-117, 119-120, 122-123, 125-126, 128-129, 131-132, 134-135, 137-138, 140-141, 143-144, 146-147, 149-150, 152-153, 155-156, 158-159, 161-162, 164-165, 167-168, 170-171, 173-174, 176-177, 179-180, 182-183, 185-186, 188-189, 191-192, 194-195, 197-198, 200-201, 203-204, 206-207, 209-210, 212-213, 215-216, 218-219, 221-222, 224-225, 227-228, 230-231, 233-234, 236-237, 239-240, 242-243, 245-246, 248-249, 251-252, 254-255, 257-258, 260-261, 263-264, 266-267, 269-270, 272-273, 275-276, 278-279, 281-282, 284-285, 287-288, 290-291, 293-294, 296-297, 299-300, 302-303, 305-306, 308-309, 311-312, 314-315, 317-318, 320-321, 323-324, 326-327, 329-330, 332-333, 335-336, 338-339, 341-342, 344-345, 347-348, 350-351, 353-354, 356-357, 359-360, 362-363, 365-366, 368-369, 371-372, 374-375, 377-378, 380-381, 383-384, 386-387, 389-390, 392-393, 395-396, 398-399, 401-402, 404-405, 407-408, 410-411, 413-414, 416-417, 419-420, 422-423, 425-426, 428-429, 431-432, 434-435, 437-438, 440-441, 443-444, 446-447, 449-450, 452-453, 455-456, 458-459, 461-462, 464-465, 467-468, 470-471, 473-474, 476-477, 479-480, 482-483, 485-486, 488-489, 491-492, 494-495, 497-498, 500-501, 503-504, 506-507, 509-510, 512-513, 515-516, 518-519, 521-522, 524-525, 527-528, 530-531, 533-534, 536-537, 539-540, 542-543, 545-546, 548-549, 551-552, 554-555, 557-558, 560-561, 563-564, 566-567, 569-570, 572-573, 575-576, 578-579, 581-582, 584-585, 587-588, 590-591, 593-594, 596-597, 599-600, 602-603, 605-606, 608-609, 611-612, 614-615, 617-618, 620-621, 623-624, 626-627, 629-630, 632-633, 635-636, 638-639, 641-642, 644-645, 647-648, 650-651, 653-654, 656-657, 659-660, 662-663, 665-666, 668-669, 671-672, 674-675, 677-678, 680-681, 683-684, 686-687, 689-690, 692-693, 695-696, 698-699, 701-702, 704-705, 707-708, 710-711, 713-714, 716-717, 719-720, 722-723, 725-726, 728-729, 731-732, 734-735, 737-738, 740-741, 743-744, 746-747, 749-750, 752-753, 755-756, 758-759, 761-762, 764-765, 767-768, 770-771, 773-774, 776-777, 779-780, 782-783, 785-786, 788-789, 791-792, 794-795, 797-798, 800-801, 803-804, 806-807, 809-810, 812-813, 815-816, 818-819, 821-822, 824-825, 827-828, 830-831, 833-834, 836-837, 839-840, 842-843, 845-846, 848-849, 851-852, 854-855, 857-858, 860-861, 863-864, 866-867, 869-870, 872-873, 875-876, 878-879, 881-882, 884-885, 887-888, 890-891, 893-894, 896-897, 899-900, 902-903, 905-906, 908-909, 911-912, 914-915, 917-918, 920-921, 923-924, 926-927, 929-930, 932-933, 935-936, 938-939, 941-942, 944-945, 947-948, 950-951, 953-954, 956-957, 959-960, 962-963, 965-966, 968-969, 971-972, 974-975, 977-978, 980-981, 983-984, 986-987, 989-990, 992-993, 995-996, 998-999, 1001-1002, 1004-1005, 1007-1008, 1010-1011, 1013-1014, 1016-1017, 1019-1020, 1022-1023, 1025-1026, 1028-1029, 1031-1032, 1034-1035, 1037-1038, 1040-1041, 1043-1044, 1046-1047, 1049-1050, 1052-1053, 1055-1056, 1058-1059, 1061-1062, 1064-1065, 1067-1068, 1070-1071, 1073-1074, 1076-1077, 1079-1080, 1082-1083, 1085-1086, 1088-1089, 1091-1092, 1094-1095, 1097-1098, 1099-1100, 1102-1103, 1105-1106, 1108-1109, 1111-1112, 1114-1115, 1117-1118, 1120-1121, 1123-1124, 1126-1127, 1129-1130, 1132-1133, 1135-1136, 1138-1139, 1141-1142, 1144-1145, 1147-1148, 1150-1151, 1153-1154, 1156-1157, 1159-1160, 1162-1163, 1165-1166, 1168-1169, 1171-1172, 1174-1175, 1177-1178, 1180-1181, 1183-1184, 1186-1187, 1189-1190, 1192-1193, 1195-1196, 1198-1199, 1201-1202, 1204-1205, 1207-1208, 1210-1211, 1213-1214, 1216-1217, 1219-1220, 1222-1223, 1225-1226, 1228-1229, 1231-1232, 1234-1235, 1237-1238, 1240-1241, 1243-1244, 1246-1247, 1249-1250, 1252-1253, 1255-1256, 1258-1259, 1261-1262, 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the Police Authority and the Police Complaints Board. Public hearings ordered under the ombudsman's powers would have real authority, in contrast to the tribunals of inquiry, and would be likely to produce full police cooperation. Although this approach would not institutionalize a completely independent investigation process, it would accommodate the demands of investigative competence and objectivity, police morale, and public confidence.

No procedure for the investigation of complaints against the police can operate effectively without police cooperation. Moreover, a police force cannot function effectively without the consent and support of the community it serves. The Chief Constable has, therefore, two mutually reinforcing interests—the enforcement of respect for the law among the constabulary and the encouragement of community support and respect for the rule of law, which is critical to effective law enforcement. Criminal activity, whether committed by police or terrorists, undermines respect for law if left unpunished. The public's revulsion at acts of violence is the natural ally of the police, but the lack of an independent procedure for the investigation of complaints deprives the constabulary of the support which could be so important in the struggle for peace in Northern Ireland.

Legal institutions and protections will not themselves eradicate the generations of mistrust in Northern Ireland. But as the public's patience with the terrorism committed in its name wears thin, desire for the rule of law undoubtedly will grow stronger. This popular desire for fair and effective law enforcement will not materialize, however, unless a legal system is established in which justice not only is done, but is seen to be done. In Northern Ireland, where memories are understandably long, reforms of the kind suggested in this Article must be implemented if this critical goal is to be achieved.

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OVERVIEW OF JUDICIAL AUTHORITY IN UNITED STATES LAW TO DETERMINE
WHETHER AN ALLEGED OFFENSE FALLS WITHIN THE POLITICAL OFFENSE EXCEPTION
FOR PURPOSES OF INTERNATIONAL EXTRADITION

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American Law Division
May 8, 1986

OVERVIEW OF JUDICIAL AUTHORITY IN UNITED STATES LAW TO DETERMINE
WHETHER AN ALLEGED OFFENSE FALLS WITHIN THE POLITICAL OFFENSE EXCEPTION
FOR PURPOSES OF INTERNATIONAL EXTRADITION

The international extradition practice of the United States still is conducted primarily within the individual frameworks of the nearly 100 bilateral extradition treaties to which it is a party. Even though the standards for extraditable offenses may vary to some degree from treaty to treaty, the applicable standards, with limited recent exception, are applied within the United States according to uniform statutory procedures. The judicial role in this process is set forth at 18 U.S.C. § 3184:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Act of June 25, 1948, C.645. 62 Stat. 822-23, as amended.

CRS-2

One determination made during the course of the extradition process is whether an offense that may be otherwise extraditable is not so because it is a political offense. That the language of section 3184, along with that of predecessor statutes dating back to 1848 (9 Stat. 302, continued as Revised Stat. § 5270 and 18 U.S.C. § 651 before current codification), comprehends judicial determination of whether an offense is a non-extraditable political crime appears to have been recognized without serious question both by the judiciary and, until recently, by the executive branch. Matter of Mackin, 668 F. 2d 122, 134-37 (2d Cir. 1981); Eain v. Wilkes, 641 F. 2d 504, 513 (7th Cir. 1981). Indeed, one jurist has suggested that one of Congress's primary motives in enacting an extradition statute was to assure that the courts would determine whether an offense was political. Mackin, 668 F. 2d at 135 (Friendly, J.).

Reported cases on the political offense issue date from at least 1894. In re Ezeta, 62 Fed. 972 (N.D. Cal. 1894). The principle that judicial officers mentioned in the extradition statute (18 U.S.C. § 3184) are to determine whether or not the crime charged is a political offense has been sustained in a number of other reported cases. E.g., Mackin, *supra*; Eain, *supra*; Jhirad v. Ferrandina, 536 F. 2d 478 (2d Cir. 1976); Shapiro v. Ferrandina, 478 F. 2d 894 (2d. Cir. 1973); Jimenez v. Aristeguieta, 311 F. 2d 547 (5th Cir. 1962); United States ex rel Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959); In re Lincoln 228 F. 70 (S.D.N.Y. 1915). The Seventh Circuit in Eain declared that "[w]e have not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented." 641 F. 2d at 513.

CRS-3

As the Second Circuit observed in Mackin, the executive branch itself over the years has recognized the judiciary's role. For example, Secretary of State Root wrote a foreign ambassador:

According to the system of jurisprudence obtaining in the United States, the question as to whether or not an offense is a political one is always decided in the first instance by the judicial officer before whom the fugitive is brought for commitment to surrender. If the judicial authorities refuse to commit the fugitive for surrender on the ground that he is a political offender, or for any other reason, the matter is dead Bearing in mind, therefore, that under our system of jurisprudence, it is not possible for any fugitive who claims to be a political offender to be extradited, it is hoped that your Government will be satisfied without insisting upon the insertion of an express stipulation providing that the question as to whether an offense is political shall be decided by the judicial authorities. (Emphasis added.)

Letter from Secretary of State Root, dated June 12, 1908; quoted in 4 G. Hackworth, Digest of International Law 46 (1942). In 1960 the Assistant Legal Adviser to the Department of State wrote a United States Attorney:

With regard to the assertion that Mylonas' extradition is being sought for acts connected with crimes or offense of a political character, it should be noted that this is a matter for decision, initially, by the extradition magistrate on the basis of the evidence submitted to him. (Emphasis added).

Letter of State Department Assistant Legal Advisor to U.S. Attorney, dated June 22, 1960, concerning In re Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960) (emphasis added); cited in 6 M. Whiteman, Digest of International Law 842, 853 (1968).

CRS-4

This history notwithstanding, judicial authority to determine political offenses has been at issue in at least four contexts during the past several years. First, the government has contended in some relatively recent political offense cases that the judiciary should not determine political offenses under current law. Second, the United States has entered into at least three bilateral extradition treaties that may give authority to determine political offenses under them to the executive branch. Third, the congressional committee reports of two of these treaties may suggest that the courts generally lack authority under current domestic law to decide what offenses are political. Fourth, Congress has considered legislation during the past several years to give the executive branch express, exclusive authority to determine what offenses are political.

The government contended in both the Eain and Mackin cases that the judiciary has no jurisdiction to determine political offenses. In response, the courts of appeals for the Seventh and Second Circuits both rejected this argument. In Eain, the Seventh Circuit stated the following:

The government's argument that the Political Branches should decide the question of whether the crime charged is a "political offense" under the Treaty has no basis in United States case precedent.

* * *

In contrast, the Judicial branch has consistently determined whether or not the "political offense" provision applies to the crime charged, presumably relying upon the language in 18 U.S.C. § 3184. That section requires a hearing to determine whether there is sufficient evidence "to sustain the charge under the provisions of the proper treaty." (Emphasis supplied.)

* * *

CRS-5

Congress originally made the determination that it is for the courts to decide how to apply the exception by making it a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime "under the provisions of" a treaty. The Executive branch has, over the years, implicitly endorsed this approach.

* * *

641 F. 2d at 513.

In Mackin, the Second Circuit tied judicial authority more directly to the history of the statutory provisions. After casting doubt on the government's arguments that treaty language and policy considerations precluded judicial consideration, Judge Friendly observed the following:

Moreover, whatever we might decide if we were writing on a clean slate, the rock on which the Government's arguments shatter is the long-standing recognition that courts shall determine whether a particular offense comes within the political offense exception. This principle was in existence at least as long ago as when *In re Kaine*, *supra*, was decided in 1852. Four years after enactment of the Act of August 12, 1848, Justice Catron, speaking for four members of the Supreme Court, wrote that "extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought never to be allowed in this country", *In re Kaine*, *supra*, 56 U.S. (14 How.) at 113. Although this statement is directed at extradition proceedings in general and not specifically at the political offense issue, Justice Catron's opinion gives no indication that the political offense issue ought to be treated differently from other issues at the extradition hearing. More importantly, an example cited by Justice Catron, relating to the alleged mistreatment of one Jonathan Robbins, suggests that the members of the Court joining in his opinion were of the view that "an unbiased hearing before an independent judiciary" was particularly necessary in cases where the political offense exception is at issue.

* * *

CRS-6

The circumstances of the Robbins case described above assume importance because, as Justice Catron noted in *In re Kaine, supra*, "[t]hat the eventful history of Robbins' case had a controlling influence on our distinguished negotiator [Daniel Webster], when the Treaty of 1842 was made; and especially on Congress, when it passed the Act of 1848, is, as I suppose, free from doubt." 55 U.S. (14 How.) at 112. With the Robbins case thus firmly in the legislature's mind, it is difficult to avoid the conclusion that when Congress charged commissioners and judges with determining whether evidence exists to "sustain [a] charge under the provisions of ... [a] treaty", 9 Stat. 302, sec. 1, it had no intention of silently exempting the political offense issue from the magistrates' consideration. Rather, the combination of the view that the Robbins case involved the political offense question, and the perception that extradition without judicial oversight was "highly dangerous to liberty and ought never to be allowed in this country", *In re Kaine, supra*, 55 U.S. (14 How.) at 113, strongly suggests that it was precisely the political offense question that was of the greatest concern to Congress in passing the Act of August 12, 1848. This view is buttressed by the references to the political offense issue in the debates on the act, see Cong. Globe, July 28, 1848 (remarks of Mr. King and Mr. Bedger).

668 F. 2d at 134, 135.

During the period that the government was contesting judicial authority in the courts, it also negotiated several extradition treaties specifically mentioning the executive branch in relation to determining political offenses. Three of these treaties have entered into force: (1) Treaty of Extradition, May 4, 1978, United States-Mexico, art. 5, para. I, T.I.A.S. No. 9656, effective January 25, 1980; (2) Treaty of Extradition, September 14, 1979, United States-Colombia, art. 4, para. 3, T.I.A.S. No. ----, effective March 4, 1982; and (3) Treaty of Extradition, June 24, 1980, United States-Netherlands, art. 4, para.

CRS-7

4, T.I.A.S. No. 10733, effective September 15, 1983. Of the three exception provisions in these treaties, only that in the Mexican treaty places the responsibility to determine whether the political offense exception applies unqualifiedly with the "Executive Authority." The Colombian treaty empowers the "Executive Authority" to decide "unless otherwise provided by the laws" of the requested State. The Dutch treaty empowers the "Executive Authority" to decide "except to the extent that the national laws of [the requested] State expressly grant such powers to its courts." The executive branch has never sought the advice and consent of the Senate with respect to a fourth treaty mentioning the executive branch, a 1981 agreement with the Philippines.

In calling for executive determination of political offenses, these four treaties appear to stand apart from the more than 90 other bilateral extradition treaties to which the United States is a party. None of the more recently negotiated extradition treaties appear to have any similar negotiated provisions. E.g., Treaty of Extradition, December 4, 1982, United States-Costa Rica, art. 4; Treaty of Extradition, June 13, 1983, United States-Ireland, art. 4; Treaty of Extradition, October 13, 1983, United States-Italy, art. 4; Treaty of Extradition, June 14, 1983, United States-Jamaica, art. 3; Treaty of Extradition, December 14, 1983, United States-Thailand, art. 3.

Even though the political offense exceptions in the Mexican, Dutch, and Colombian treaties differ from those found in earlier treaties, their published legislative histories are relatively meager. Apparently, there is no published explanation of the "Executive Authority" language in the Mexican treaty. Secretary of State Vance did not mention it in his Letter of Submittal. Exec. Doc. M, 96th Cong., 1st Sess. v (1979). Rather, discussion of the poli-

tical offense exception focused on the exclusion of certain types of offenses from consideration as political offenses. Id. at vi. Similarly, the Senate Report did not explain "Executive Authority" in either its Summary of Changes in New Treaty or its Additional Comments. Exec. Rep. 21, 96th Cong., 1st Sess. 19, 10-21 (1979). Nor was the political offense exception clause debated during approval. 125 CONG. REC. S17548-51 (daily ed. Nov. 30, 1979).

The published history of the Colombian and Dutch treaties briefly explain what Congress and the administration thought the effect of the "Executive Authority" language would be. However, they do not note that conferring authority on the "Executive Authority" to decide whether a particular offense is political is a departure from previous practice, nor is mention made of the reasons for the change. Deputy Secretary of State Clark concluded in his Letter of Submittal that under the Colombian treaty (Executive Authority of the Requested State to decide unless otherwise provided by the laws of that State), the executive branch of the federal government would decide whether the political offense exception applies:

Article 4 grants the Executive Authority of the requested State the authority to decide on the application of the political or military offense exceptions unless it is otherwise provided by the laws of that State. This would mean that in the United States the authority rests with the Executive Branch.

Treaty Doc. 8, 97th Cong., 1st Sess. vi (1981).

That conclusion is repeated by the Senate Foreign Relations Committee:

Article 4 provides an exception preventing extradition for political offenses as well as military offenses. Extradition will additionally be denied where the request, while involving a non-political offense, is made for political purposes. The Executive Authority of each Party has

CRS-9

the responsibility of determining whether a request for extradition involves a political or military offense, unless the national laws of the Requested State grant such powers to its courts. United States law does not grant such powers to its courts and the authority, therefore, rests with the Executive Branch.

Exec. Rep. 34, 97th Cong., 1st Sess. 3 (1981). See also pp. 4,5.

The published history of the political offense exception in the Dutch Treaty (Executive Authority of the requested State to decide "except to the extent that the national laws of that State expressly grant such powers to its courts") is similar to that of the Colombian provision. Deputy Secretary Clark explained application of the exception as follows:

Article 4 gives the Executive Authority of each Party the responsibility of determining whether a request for extradition involves a political or military offense, unless the national laws of the requested Party grant such powers to its courts. In the United States, the laws do not grant such powers to the courts, and the authority, therefore, would rest with the Executive branch.

Treaty Doc. 7, 97th Cong., 1st Sess. vi (1981) (Letter of Submittal of Deputy Secretary of State Clark).

The comments of the Senate Foreign Relations Committee added little to those from the executive branch:

Article 4 gives the Executive Authority of each Party the responsibility of determining whether a request for extradition involves a political or military offense, unless the national laws of the Requested Party grant such powers to its courts. In the United States, the laws do not grant such powers to its courts, and the authority, therefore, would rest with

CRS-10

the Executive Branch. Similar provisions are contained in the new Mexican treaty and the proposed Colombian treaty.

Exec. Rep. 33, 97th Cong., 1st Sess. 6 (1981).

The Senate considered both the Colombian and Dutch extradition treaties on December 2, 1981. As with the approval of the Mexican treaty before them, no mention was made of the political offense exceptions during debate. 127 CONG. REC. S14275-76 (daily ed. Dec. 2, 1981).

In light of the longstanding American practice of judicial determination of political offenses, it is not altogether clear what Deputy Secretary Clark and the Foreign Relations Committee based their observations upon. Both the Dutch and Colombian treaties refer to the "laws" of the requested state. Perhaps Deputy Secretary Clark and the Foreign Relations Committee interpreted "laws" to mean statutes only and regarded judicial determination of political offenses somehow to be based solely in case law. It may be observed that the executive branch was at that time (unsuccessfully) making similar arguments before the courts. It may further be observed that the statements were made after the Eain decision but before the Mackin decision, which more directly linked judicial determination to congressional enactment.

In any event, when Congress the following year closely focused on the role of the judiciary with respect to the political offense exception, the Foreign Relations Committee expressly recognized judicial determination in current American law and was a leading advocate of its continuance. While the Senate Judiciary Committee was considering S. 1940, the Extradition Act of 1981, during the 97th Congress, Senator Percy, chairman of the Foreign Relation Committee, requested that S. 1940 be sequentially referred

CRS-11

to his committee. S. Rep. 475, 97th Cong., 2d Sess. 3 (1982). Of particular concern to Senator Percy were those provisions of S. 1940 that would have given the executive express, exclusive authority to determine political offenses and have set forth statutory standards for them. Id. The committee subsequently proposed amending the Judiciary Committee bill to allow for a continued role for the courts:

The Committee on Foreign Relations proposes amending section 3194(a), as reported by the Committee on the Judiciary, to permit the appropriate courts to make findings concerning the application of the political offense exception. While it can be argued that the Secretary of State is generally better able than the courts to assess the circumstances justifying a political offense exception, the Committee favors the retention of some role for the judicial process. Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authority that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.

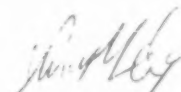
Id. at 7.

Neither the proposed Extradition Act of 1981 nor any other comprehensive proposal to amend the extradition statute has passed Congress.

In summary, the courts and the executive branch historically have agreed that the judiciary by statute and custom has jurisdiction to determine whether an offense is a political one for purposes of international extradition. However, the executive branch has departed from this position at times during the

CRS-12

past decade. Furthermore, the United States has entered to one bilateral treaty that clearly entrusts this determination to the executive and into two others that possibly may do so. On the other hand, legislative efforts have not been successful thus far to delegate to the executive the authority to determine political offenses generally.



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